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CHARLES ELMORE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs.

No. 344

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLAS, ETC., et al.,

Appellees.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLAS, ETC., et al.,

Cross-Appellants,

vs.

No. 345

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

Brief of Appellees and Cross-Appellants on Re-Argument

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SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
THE PROCEEDINGS IN THIS COURT UPON THIS APPEAL	3
POINT I. The District Court Had Jurisdiction to Award Restitution and Should Have Exercised Such Jurisdiction in this Case	4
(a) Jurisdiction is Inherent in Every Court to Right the Wrongs Which Have Resulted Through the Entry of the Wrong Decree Afterwards Reversed	4
(b) The Fact that the Erroneous Decree of the District Court (afterwards reversed) Was Negative in Form is Not Material	6
(c) Every Court, Including a Specially Constituted District Court Consisting of Three Judges Acting Under the Urgent Deficiencies Act of 1913, Has Jurisdiction and Power to Award Restitution	11
(d) The Claimants Were Entitled to Restitution in the Court Below as a Matter of Right. It Was the Duty of That Court to Exercise Jurisdiction and Award Restitution	11

(e) The Court Had Jurisdiction and It Was the Duty of the Court to Exercise Such Jurisdiction Upon the Ancient Doctrine of Avoidance of Multiplicity of Suits 13

POINT I-A. The Status of the Invalid Order of the Interstate Commerce Commission Which Was Set Aside—No Life or Force Was or Could Be Given It By the Interstate Commerce Commission in Subsequent Proceedings. The Restitution Here Is for the District Court and Not for the Interstate Commerce Commission to Award 14

(a) The Order of the Interstate Commerce Commission Which the Erroneous Decree of the District Court Refused to Set Aside in the First Instance Was Void 15

(b) Even If the Unlawful Order of the Interstate Commerce Commission Was Not Void Ab Initio, the Reversal of the Decree of the District Court Takes Effect as of the Time When the District Court Should Have Rendered the Right Decree in the First Instance 19

(c) The scope of the Authority of the Interstate Commerce Commission in Dealing With Intrastate Rates 20

(d) The Motion of the Railroad Company Filed in This Court to Stay the Mandates and the Operation and Effect of the Motion Either (a) in This Court or (b) in the District Court. The Effect of the Order of This Court Denying Such Motion 27

(e) The Order of the Interstate Commerce Commission Made July 5, 1932, After the Time of the Shipment of the Logs Here Involved Fixed Rates for Future Application. Neither that Order Nor the Report Accompanying It Nor Any Subsequent Order or Report Attempted to Cure the Defect in the Unlawful Order Which Had Been Stricken Down by this Court. If Any Attempt Had Been Made By the Subsequent Order to Supply the Findings Lacking in the Unlawful Order, Such Attempt Would Have Been Void 31

(f) The Tariff Filed by the Railroad Company with the Interstate Commerce Commission Pursuant to the Invalid Order of the Commission Can Avail the Railroad Company Nothing in These Restitution Proceedings ... 34

(g) The Railroad Company Invoked the Jurisdiction of the Court Below in Its Responses to the Motions for Restitution 36

(h) The Appellees and Cross-Appellants Were Not Bound to Seek Reparations Before the Interstate Commerce Commission Instead of Restitution before the Court. The Interstate Commerce Act as Amended Did Not Operate to Oust the District Court of Its Jurisdiction to Award Restitution or Its Duty So to Do .. 39

(i) The Proceedings at Bar Are Not Founded Upon a Violation of the Interstate Commerce Act, as Amended, But Are Upon the Mandates of This Court 42

POINT II. The Measure of Restitution Which Should be Awarded 46

(a) Restitution Means Restoration, and the Fundamental Theory of It Requires That the Railroad Company Restore What the Claimants in Restitution Have Lost Because of the Failure of the District Court to Enter the Right Decree in the First Instance 47

(b) The Cummer Scale Was the Lawful State Rate When the Interstate Commerce Commission Attempted to Supersede It With the Unlawful Order Which the District Court Should Have Set Aside in the First Instance 48

(c) Is Not the Railroad Company Estopped to Deny that the Cummer Scale Was the Lawful State Rate at the Time the District Court Entered Its Decree? 53

(d) Even If This Court Should Hold That the Cummer Scale Was Not the Lawful State Rate and Had Only Prima Facie Effect in These Restitution Proceedings, We Submit that Neither the Master Nor the District Court Was Warranted in Finding That the Cummer Scale Was Unreasonable, Non-compensatory or Confiscatory 56

(e) An Appeal to this Court from a Final Decree in Equity Automatically Brings Up for Review All Interlocutory Orders Preceding that Decree in the Court Below 59

(f) If This Court Should Hold That the Cummey Scale Was Not the Lawful State Rate, and That Its Prima Facie Effect Had Been Overcome So That There Was No Lawful State Rate, then the Restitution Must Be Measured By the Common Law Standard Upon the Ancient Doctrine of Quantum Meruit 60

(g) The Way in Which the District Court Applied the Law to the Facts in Awarding Restitution Upon the Common Law Standard. The Way in Which the District Court Should Have Applied It 62

(h) The Measure of the Award of Restitution for the Claimants Respectively in the Event That This Court Finds That It Should Be Measured Upon the Common Law Standard .. 68

(i) Our View Is That the Original Proceedings Before the Interstate Commerce Commission and the Original Proceedings Before the District Court, and These Restitution Proceedings Relate Only Remotely to the Revenue Needs of the Carrier. But If They Do Relate Proximately to Such Revenue Needs, the Principles Herein Set Forth Must Be Applied Notwithstanding 70

POINT III. The Effect to be Attributed in These Proceedings to the Proceedings Before and the Findings of the Interstate Commerce Commission 74

(a) The Effect Which Should Be Attributed to the Proceedings Before and Findings of the Interstate Commerce Commission By Which the Commission Attempted to Support the Invalid Order of August 2nd, 1928 75

(b) The Effect Which Should Be Attributed to the Proceedings Before, and the Findings of, the Interstate Commerce Commission by Which the Commission Supported Its Order of July 5th, 1932 82

(c) A Determination Even By the Judicial Branch of the Government That a Rate for Future Application Is Non-Compensatory Is Entitled to No Weight in Awarding Restitution Consequent Upon a Former Decree Which Had Been Reversed 87

(d) These Restitution Proceedings Are Not in Continuation of the Proceedings Before the Interstate Commerce Commission, But Are Upon the Mandates of This Court in Continuation of the Original Proceedings in the District Court 88

(e) The Orders and Findings in the Reopened Proceedings Did Not Revive or Give Effect Ab Initio or Otherwise to the Invalid Order of the Commission, or Supply the Basic, Essential and Quasi-Jurisdictional Findings Which Were Lacking in the Original Proceedings 89

POINT IV. The Differences Between the Evidence Before the District Court and that Before the Interstate Commerce Commission 90

(a) The Evidence in the Original Proceeding Before the Interstate Commerce Commission .. 90

(b) The Evidence in the Re-opened Proceeding Before the Interstate Commerce Commission 94

(c) The Evidence Before the District Court on the First Reference to the Master Was Substantially the Same as That Before the Interstate Commerce Commission 98

(d) The Evidence Before the District Court Upon the Re-reference to the Master, and the Difference Between that Evidence and the Evidence Before the Interstate Commerce Commission 99

(e) The Cost Evidence Considered by the Interstate Commerce Commission Was Directed to the Single Carload Shipments, and the Burden Upon Interstate Commerce Which Might Be Thereby Occasioned, Not to the Compensatory Character of the Rate as Actually Applied 109

CONCLUSION 116

TABLE OF CASES CITED

	Page
American Express Company v. South Dakota, 244 U. S. 617	25
Anniston Manufacturing Co. v. Southern Railway, 40 Southern 965	88
Arizona Grocery Co. v. Atchison T. & S. F. R. Co., 284 U. S. 370	35, 51, 55
Arkadelphia Milling Co. v. St. L. S. W. R. Co., 249 U. S. 134	4, 6, 12, 40, 44, 48, 66
Baltimore & O. R. Co. v. United States, 279 U. S. 781	4, 7-13, 19, 38-40, 44, 79
Baltimore & O. R. Co. v. United States, 277 U. S. 291	7
Baltimore & O. R. Co. v. United States, 284 U. S. 195	33, 87
Bickett v. Garner, 31 Ohio St. 28	12
Board of Railroad Commissioners v. Great Northern R. Co., 281 U. S. 412	20, 29, 73, 88
Brown Shoe Company v. Crosby, 30 Ga. App. 534, 118 S. E. 446	19
C. B. & Q. Rd. Co. v. Merriam & Millard Co., 297 Fed. 1 (C. C. A. 8)	35
Cullen v. Seaboard Air Line Ry. Co., 63 Fla. 122	49, 61, 67
Ex parte Lincoln Gas & Electric Light Co., 256 U. S. 512	4, 6, 48
Ex parte Lincoln Gas & Electric Light Co., 257 U. S. 6	4, 6, 12, 48, 87, 88
Ex parte Walter Bros., 89 Ala. 237, 18 Am. St. Rep. 103	13

Florence Cotton etc. Co. v. Louisville Banking Co.,
138 Ala. 588, 36 So. 456 13
Florida v. United States,
282 U. S. 194 ..... 2, 15, 20, 22, 24, 70, 71, 78, 79
Florida v. United States, 4 Fed. Supp. 477 83
Florida v. United States, 292 U. S. 1 83
Freeman on Judgments, (5th Ed.) Section 1167 19
Gilchrist v. Interboro Rapid Transit Co.,
279 U. S. 159 53
Golde Clothes Shop v. Loew's Buffalow Theatres,
236 N. Y. 465, 141 N. E. 917 19
Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963,
15 L. R. A. 588 13
Illinois Central R. Co. v. State Public Utilities
Com., 245 U. S. 493 ..... 25, 80
In Re Potts, 166 U. S. 263 ..... 31, 82
In Re Sanford Fork & Tool Co., 160 U. S. 247 31
Interstate Commerce Commission v. Alabama
M. R. Co., 163 U. S. 144 67
Interstate Commerce Commission v. B. & O. R. Co.,
43 Fed. 37 67
Kendall v. Ewert, 259 U. S. 139 60
La Floridienne v. Atlantic Coast Line R. Co.,
63 Fla. 208 ..... 49, 61
Lewis Mercantile Co. v. Klepner, 176 Fed. 343 38
Louisville & Nashville R. Co. v. Central Iron Co.,
265 U. S. 59 35
Louisville & N. R. Co. v. Garret, 231 U. S. 299 ..... 63, 67
Louisville & N. R. Co. v. Kentucky R. R. Co.
(D. C. Ky.) 214 Fed. 485, (affirmed, 235 U. S. 601) 56

Louisville & N. R. Co. v. Speed-Parker, Inc.,
103 Fla. 439, 137 So. 724 ..... 36, 49, 61
Lummis v. Lehigh Valley R. Co., 208 N. Y. 312,
101 N. E. 907, (affirmed 240 U. S. 43) 43, 44
Lytle v. Lytle, 94 N. C. 522 12
Merchants Heat & Light Co. v. Clow, 204 U. S. 286 38
Mutual Creamery Co. v. American Railway
Express Co., 132 I. C. C. 207 45
Northwestern Fuel Co. v. Brock,
139 U. S. 216 ..... 5, 12, 41, 44, 48
Penn Refining Co. v. Western N. Y. & P. R. Co.,
208 U. S. 208 67
Penn R. Co. v. Mitchell Coal & C. Co., 238 U. S. 251 ..... 43, 44
Pensacola & Atlantic R. Co. v. Florida, 25 Fla. 310 ..... 48, 61
Perkins v. Fourniquett, 47 U. S. 206 60
Perry v. Tupper, 71 N. C. 385 12
Port of New York Authority v. A. T. & S. F. R. Co.,
et al., 144 I. C. C. 514 46
Reinschmidt, et al. v. Louisville & N. R. Co.,
(not yet reported, Appendix A,
page 118) 36, 49, 55, 118
Smith v. Illinois Bell Telephone Co., 282 U. S. 133 28
State ex rel Railroad Commissioners v. Florida
E. C. R. Co., 64 Fla. 112, 59 So. 385 66
State ex rel Railroad Commissioners v. Atlantic
Coast Line R. Co., 59 Fla. 612, 52 So. 4 66
State ex rel Railroad Commissioners v. Atlantic
Coast Line R. Co., 60 Fla. 218, 53 So. 201 66
Terminal R. Assn. v. United States, 266 U. S. 17 ..... 9, 41
Texas & P. R. Co. v. Abilene Cotton Oil Co.,
204 U. S. 426 44

United States v. State of Louisiana, 290 U. S. 70 ..... 71, 91
United States, et al., v. Baltimore & Ohio R. Co., (decided Jan. 7, 1935) 17, 25, 73, 78, 79
Ure v. Ure, 223 Ill. 459, 79 N. E. 153 19
Western & Atlantic R. Co. v. Georgia Public Service Commission, 267 U. S. 493 ..... 51, 53

TABLE OF STATUTES CITED

Page

Interstate Commerce Act:
Section 1 (Sub-Par. 2(a) of Par. (c)) 23
*Section 3 65
**Section 13 (1) 42, 43
*Sections 13 (3) and 13 (4) 20, 43, 73
Section 16(3) 42, 43

Compiled Gen. Laws of Fla. 1927:
***Section 6722 51
Section 6699 65
Rule 16—Fla. R. R. Comm. (printed in Exhibits, pages 1-3) 50, 53

Note

* —Printed in APPENDIX NO. 2 of "Brief of Cross-Appellants."

** —Printed in APPENDIX C of "Supplemental Brief of Appellees of and Cross-Appellants."

*** —Printed in APPENDIX A of "Supplemental Brief of Appellees and Cross-Appellants."

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs. No. 345

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLAS, ETC., et al.,

Appellees.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLAS, ETC., et al.,

Cross-Appellants,

vs. No. 344

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

Brief of Appellees and Cross-Appellants on Re-Argument

PRELIMINARY STATEMENT

The decree appealed from (R. 383) is an award of restitution by which these cross-appellants, severally, are

decreed to have and recover of and from the Atlantic Coast Line Railroad Company certain specified sums. The appeal questions the right of the appellees and cross-appellants to any award at all. The cross-appeal brings into question the measure of the award and the sufficiency of the amount awarded.

The decree below was entered by a statutory three-judge Court, sitting as the United States District Court for the Northern District of Georgia, Atlanta Division, pursuant to the Urgent Deficiencies Act of 1913. The proceedings below were in continuation of and upon the mandates of this Court entered in three causes heard and decided by this Court, and cited as *Florida, et al. v. United States of America, et al.*, 282 *U. S.* 194. The District Court in the original proceedings before it had refused to set aside an order of the Interstates Commerce Commission which attempted to prescribe intrastate rates on logs in Florida and dismissed the bills of complaint which had been filed by the Cross-appellants. This court in *Florida v. United States of America*, supra, reversed the decree of the District Court and directed that the order of the Interstate Commerce Commission be set aside insofar as it attempted to prescribe intrastate rates on logs.

STATEMENT OF THE CASE

The case is fully stated in our main brief herein entitled "BRIEF OF CROSS-APPELLANTS" at pages 2 to 26, inclusive, to which reference is here made.

THE PROCEEDINGS IN THIS COURT UPON THIS APPEAL

Briefs were filed by the parties to these appeals and the cause was argued by counsel on January 17th and 18th, 1935. On February 4th this Court ordered that the cases be restored to the docket and assigned for reargument on Monday, March 4th, 1935, and the attention of counsel was directed to the following points on which the Court desired to hear argument:

> (1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates;
>
> (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what should be the measure of an award of restitution;
>
> (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission.

Counsel were also requested to point out what differences, if any, there were between the evidence before the District Court and that before the Interstate Commerce Commission.

This brief will deal with and be limited to those points.

POINT I.

THE DISTRICT COURT HAD JURISDICTION TO AWARD RESTITUTION AND SHOULD HAVE EXERCISED SUCH JURISDICTION IN THIS CASE.

(a). Jurisdiction is Inherent In Every Court to Right the Wrongs Which Have Resulted through the Entry of the Wrong Decree Afterwards Reversed.

The restitution proceedings in the Court below were incident to and in effect a part of the main or original suits. *Baltimore & O. R. Co. vs. United States*, 279 *U. S.* 781, 785. The jurisdiction of the Special Statutory Three-Judge Court

> "necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation."
>
> *Baltimore & O. R. Co. vs. United States, supra*, text 785.

The restitution proceedings were proceedings upon the mandates of this Court: *Baltimore & O. R. Co. vs. United States, supra, text* 783, 784; *Ex parte Lincoln Gas & Electric Light Co.*, 256 *U. S.* 512, 516; *Arkadelphia Milling Co. vs. St. Louis, S. W. Ry. Co.*, 249 *U. S.* 134, 143, 147.

And had the District Court refused to exercise jurisdiction to award restitution, there seems to be no doubt that under the decisions of this court the District Court might have been required by writ of mandamus to comply with the terms of the mandates and award restitution. *Baltimore & O. R. Co. vs. United States, supra, text* 785, and cases cited.

And the law is clear that a trial court, upon the reversal of an erroneous judgment, has jurisdiction to award restitution even though its judgment was reversed solely upon the ground that it was without jurisdiction to enter it. This Court so held in *Northwestern Fuel Co. vs. Brock*, 139 *U. S.* 216, and in so holding said:

> "and the power is inherent in every Court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally, and in which it therefore acted erroneously, and to restore, as far as possible, the parties to their former position. * * *
>
> * "Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to to it by an appellate tribunal * * * ".

In the original proceedings in the *Brock case*, supra, the inferior Federal Court had entered a judgment upon a contract claim, and upon appeal the judgment had been reversed upon the sole ground that the inferior court had no jurisdiction of the subject matter. Upon the coming down of the mandate the trial court refused to award

restitution, holding that it had no jurisdiction to do so. But this Court reversed the trial court and directed that restitution be awarded, laying down the principles set forth above.

In *Arkadelphia Milling Co. vs. St. Louis & S. W. R. Co.*, supra, restitution was awarded. There the railroad company obtained in the inferior Federal court an injunction upon the sole ground that rates prescribed by the Arkansas Commission were in violation of its rights under the Federal Constitution. Upon a former appeal the cause had been reversed and a mandate, of like import to the mandates at bar, sent down. Upon the coming down of the mandate it was asserted by the railroad company that the trial court was without jurisdiction to award restitution. But this Court declared with respect to the jurisdiction to award restitution that:

> "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject matter, and of the parties, to correct that which has been wrongfully done by virtue of its process" (citing cases).

The same principles were confirmed by this Court in *Ex parte Lincoln Gas & Electric Light Company*, 256 U. S. 512, (S. C.) 257 U. S. 6.

(b). The Fact that the Erroneous Decree of the District Court (afterwards reversed) was Negative in Form is Not Material.

Northwestern Fuel Company vs. Brock, *supra*, the *Arkadelphia Milling Company* case, *supra*, and the *Lincoln*

Gas & Electric Light Company case, *supra*, were all affirmative judgments or decrees. But all of those cases were cited with approval and relied upon in *Baltimore & Ohio R. Co. vs. United States* (supra).

There the proceedings originated in a bill filed under the Urgent Deficiencies Act of 1913 to set aside an order of the Interstate Commerce Commission. That case, like this, was twice before this Court; first, upon the validity of the order of the Commission which was sustained by the District Court but stricken down by this Court (*B. & O. R. Co. vs. United States*, 277 *U. S.* 291), and second, upon the claims for restitution arising out of the failure of the District Court to enter in the first instance the decree which this Court found that it should have entered. The pertinent facts in the controversy there were these:

There were certain railroads operating chiefly on the East side of the Mississippi River, whose western terminii were at East St. Louis, and others operating chiefly on the West side of the River whose eastern terminii were at St. Louis. For many years the Eastside lines and the Westside lines had exchanged traffic by means of the facilities of the Terminal Railroad Association which operated a transfer system across the Mississippi River between the two cities. The Westside roads, in order to meet the competition of other railroads whose lines reached to East St. Louis, made the same rates to both cities and absorbed and bore the cost of transferring all freight across the River. On most of the traffic the Eastside roads made the same rates to both cities, but on through traffic moving on combination rates through both points their rates applied only to East St. Louis. The Westside roads

made complaint to the Interstate Commerce Commission and secured its order requiring the Eastside roads to absorb the charges for transfer across the River on all westbound through traffic moving on combination rates which were the same at St. Louis as at East St. Louis. The Eastside roads brought suit against the United States under the Urgent Deficiencies Act of 1913 to set aside the order of the Commission. And the Commission and the Westside roads intervened. The District Court, consisting of three judges, dismissed the suit for want of equity. This Court (277 U. S. 291) reversed the decree and by its mandate directed that such further proceedings be had in the case in conformity with the opinion and decree as according to right and justice and the laws of the United States ought to be had. The mandate was substantially in the form of the mandates involved in the case now at bar. The report of the Commission in the *Baltimore & Ohio* case which accompanied its order showed that it held that the matter in controversy before it "was a practice within the meaning of the Interstate Commerce Act," and relied on *Sections* 1 (6) *and* (11), relating to the duty of carriers to establish just and reasonable regulations and practices relating to classifications, rates or tariffs, and *Section* 15 (1) authorizing the Commission to prescribe just and reasonable rates, classifications, regulations or practices upon a finding that those existing are unreasonable (277 U. S. 293, 299, 300). This Court expressed doubt whether the matter was a practice within the meaning of the Act, but found that if it were there was insufficient evidence to support a finding of the Commission that it was unjust and unreasonable (277 U. S. text 300). But the right of the Interstate Commerce Com-

mission to prescribe the rates charged for the transfer or to fix a division of the through rate was recognized as having been established by a former decision of the Court (*Terminal R. Assn. v. United States*, 266 U. S. 17). And this Court found that the report of the Commission showed

> "that the propriety of the division was not the subject of inquiry and investigation" (277 U. S. text 300).

The District Court in the original proceedings had refused to set aside the order of the Interstate Commerce Commission, and had dismissed the bill of complaint of the Eastside roads which sought to set it aside. And this Court held that the order of the Commission could not be sustained and reversed the decree of the District Court and sent down its mandate as above stated.

The mandate having been filed in the District Court, the Eastside roads applied for a decree in conformity with it. It prayed that the decree require the Westside roads severally to restore to the respective Eastside roads the amounts which because of the erroneous decree of dismissal they had borne and paid, and that the case be referred to a Master to ascertain the amounts (279 U. S. text 783-4).

The motions in restitution in the case at bar are modelled upon those employed in the *Baltimore & Ohio* case. After hearing, the District Court, (in the *Baltimore & Ohio* case) consisting of three judges, vacated its earlier decree and set aside the order of the Commission. The Court found that the Eastside roads had compiled with the order of the Commission, as alleged, but retained jurisdic-

tion of the case and afterwards entered its final decree denying restitution. Upon the appeal in this Court taken by the Eastside roads, every question of substance was raised which has been raised in the case at bar. Some of them will be discussed in a subsequent portion of this brief. It is sufficient under this sub-topic to point out that it was earnestly argued in briefs of the Westside roads that the order being negative in character, the principles laid down in *Northwestern Fuel Company vs. Brock*, *supra*, and the *Arkadelphia Milling Company case*, *supra*, and the *Lincoln Gas & Electric cases*, *supra*, were not applicable; but this Court held otherwise and declared (Text 785):

> "The east-side roads are entitled to restitution. The order should have been set aside in the first instance. As a result of the erroneous refusal of the court, the burden of the transfer charges in question was shifted from the west-side roads to the east-side roads, and was by them borne until the order was set aside on the reversal of the decree dismissing the bill. * * *
>
> "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And while the subject of the controversy and the parties are before the Court, it has jurisdiction to enforce restitution, and so far as possible to correct what has been wrongfully done", citing the *Northwestern Fuel Company* case, *supra*, the *Arkadelphia Milling Company* case, *supra*, and the *Lincoln Gas & Electric Light Company* cases, *supra*.

And though the erroneous decree which had been reversed was negative in form, this Court applied the principles set forth above and ordered restitution.

(c). Every Court, Including a Specially Constituted District Court Consisting of Three Judges Acting Under the Urgent Deficiencies Act of 1913, has Jurisdiction and Power to Award Restitution.

Upon the second appeal of the *Baltimore & Ohio* case *supra*, (279 U. S. 781), the Westside roads in their briefs insisted that the power to award restitution was not within the jurisdiction of a specially constituted District Court. But this Court overruled that contention and held that while the subject of the controversy and the parties were before the District Court, that Court

> "has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done." (Text 786).

(d). The Claimants were Entitled to Restitution in the Court Below as a Matter of Right. It was the Duty of that Court to Exercise Jurisdiction and Award Restitution.

The overwhelming weight of authority is that restitution is a matter of right and that it is the duty of the Court whose erroneous decree was reversed to restore what has been lost by virtue of the entry of the wrong decree in the

first instance. We respectfully submit that such is the rule laid down in the decisions of this Court:

Northwestern Fuel Company Case, supra;
Arkadelphia Milling Company Case, supra;
Ex Parte Lincoln Gas & Electric Light Company Case, supra;
Baltimore & O. R. Co. v. United States, supra, 279 U. S. 781.

In the case last cited this Court said in part:

"The East side roads are entitled to restitution. The order should have been set aside in the first instance * * *.

The *right* to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done". (Italics ours).

See also:

Lytle v. Lytle, 94 N. C. 522;
Perry v. Tupper, 71 N. C. 385;
Bickett v. Garner, 31 Ohio St. 28;

Florence Cotton etc. Co. v. Louisville Banking Co., 138 Ala. 588, 36 So. 456;
Ex Parte Walter Bros., 89 Ala. 237, 18 Am. St. Rep. 103;
Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588.

And such is the holding of the majority of the decisions of the Courts of last resort where the question has been considered. An analysis of the cases would seem unnecessary here in view of the unbroken line of authority in the decisions of this Court upon the subject.

(e). The Court Had Jurisdiction and It Was the Duty of the Court to Exercise Such Jurisdiction upon the Ancient Doctrine of Avoidance of Multiplicity of Suits.

More than eighteen thousand cars of logs moved during the restitution period. If there were any doubt as to the jurisdiction of the District Court and its duty to exercise it, that doubt would be resolved in favor of the jurisdiction under the ancient doctrine of avoidance of multiplicity of suits. In the *Baltimore & Ohio case*, supra, (279 U. S. 781) this Court considered this very jurisdiction of the Court and the duty of the District Court to exercise it in the restitution proceedings, under circumstances similar to those at bar, and declared:

"Before the reversal of the erroneous decree, there was transferred across the river a very great

number of shipments covered by the order. The transfer charge on each constitutes a claim in favor of an east-side road and against a west-side road. If each claim is treated as a separate cause of action enforceable only at law, the number of suits and the burden of maintaining them would be so enormous that the relegation of the east-side roads to that remedy would be a virtual denial of justice. It was the duty of the court to retain jurisdiction of the case, enter a decree that appellants are entitled to restitution, and refer the case to a master, as prayed in appellants' motion. Ex Parte Lincoln Gas & E. Light Co. supra, 517 (41 S. Ct. 558)".

POINT I A

THE STATUS OF THE INVALID ORDER OF THE INTERSTATE COMMERCE COMMISSION WHICH WAS SET ASIDE—NO LIFE OR FORCE WAS OR COULD BE GIVEN IT BY THE INTERSTATE COMMERCE COMMISSION IN SUBSEQUENT PROCEEDINGS. THE RESTITUTION HERE IS FOR THE DISTRICT COURT AND NOT FOR THE INTERSTATE COMMERCE COMMISSION TO AWARD.

The Railroad Company upon this appeal contends that the District Court was without jurisdiction to award restitution and thus right the wrong resulting from its erroneous decree, (1) because, (so the Railroad Company asserts)

the invalid order of the Interstate Commerce Commission might have been given full force and vigor by subsequent retroactive findings or orders of the Commission, and (2) because under the Interstate Commerce Act as amended (so the Railroad Company asserts) the Claimants in restitution were required to apply to the Commission for reparations instead of to the Court for restitution.

In the next succeeding sub-topics, we shall discuss the status of the invalid order, the effect of the reversal of the erroneous decree which sustained it, the powers of the Commission with respect to intrastate rates, the effect of the determinations of this Court upon the first appeal, and the position of the Railroad Company with respect to the Jurisdiction of the District Court when the case was heard there.

(a). The Order of the Interstate Commerce Commission Which the Erroneous Decree of the District Court Refused to Set Aside in the First Instance was Void.

When this Court reversed the erroneous decree of the District Court upon the first appeal (*Florida vs. United States*, 282 U. S. 194) and struck down the Commission's order, it said with respect to the deficiencies in that order in part:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination to the importance of which this Court has recently

adverted (Beaumont, S. L. & W. R. Co. vs. United States, * * * 282 U. S. 74), but of the lack of the basic or essential findings required to support the Commission's order".

From the beginning of the restitution proceedings, we have insisted that this lack of "basic or essential findings" was fundamental and fatal, and that the effect of the sentence of this Court upon it was to determine that it was without validity insofar as it purported to prescribe intrastate rates. This view is fortified by the holding of this Court in the case that,

> "* * * whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of federal power must clearly appear". (282 U. S. text 211, 212).

On the other hand, from the beginning of the restitution proceedings the Railroad Company has insisted that the defect in the Commission's order was merely "procedural", and that nothwithstanding that this Court had adjudged it to be invalid for lack of basic or essential findings and had held that the District Court ought to have set it aside in the first instance, there remained after it had been set aside such life and vigor as would give it complete validity *ab initio*, if at a later date the "basic or essential findings" should be supplied by a subsequent order in the reopened proceedings, and based upon new evidence adduced, before the Commission.

Obviously the Commission entertained no such views, for it made no attempt to do any such thing. That fact, as well as the limited power of the Commission with respect to intrastate rates, is the subject matter of discussion in another portion of this brief. We now point out that this Court at this term in *United States, et al, vs. Baltimore & Ohio R. Co.*, decided January 7th, 1935, has construed the Florida case (282 U. S. 194) and the effect of the "lack of the basic or essential findings required to support the Commission's order". In said *Baltimore & Ohio case*, this Court considered an order of the Interstate Commerce Commission made under the Boiler Inspection Act, seeking to amend a rule prescribing power reverse gear for steam locomotives, and declared:

> "The primary question of fact presented for determination was, as the report of the Commission states, 'whether the use of locomotives equipped with hand reverse gear as compared with power reverse gear, causes unnecessary peril to life or limb.'"

There was no direct finding upon this subject, and this Court held the order invalid on that account, and in so doing said in part:

> "This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void. Florida vs. United States, 282 U. S. 194, 215 * * *.

"In the Florida case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in Beaumont, Sour Lake & W. R. Co. vs. United States, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts.

"The lack of such a complete statement, while always regrettable because unnecessarily increasing the labor of the reviewing court, * * * is not fatal to the validity of the order.

"It is true that formal and precise findings are not required under Section 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission, together with its decision'. *** That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But Section 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity".

While it is not necessary to so hold to sustain the right of the appellees and cross-appellants to restitution, it is obvious that the order of the Interstate Commerce Commission which ought to have been set aside by the District Court in the first instance was void for the lack of quasi-jurisdictional findings.

(b). Even If The Unlawful Order of the Interstate Commerce Commission Was Not Void ab initio, the Reversal of the Decree of the District Court takes Effect as of the Time When the District Court Should have Rendered the Right Decree in the First Instance.

The law is well settled that the effect of the reversal of a decree is to expunge it from the record and to restore to the parties litigant the original rights which they would have enjoyed had the right decree been entered in the first instance: *Freeman on Judgments*, (5th Ed.) Section 1167; *Ure vs. Ure*, 223 Ill. 459, 79 N. E. 153; *Brown Shoe Company vs. Crosby*, 30 Ga. App. 534, 118 S. E. 446; *Golde Clothes Shop vs. Loew's Buffalow Theatres*, 236 N. Y. 465, 141 N. E. 917.

Nor will it do to assert that the unlawful order of the Interstate Commerce Commission was legislative in character and was not stayed by the appeal from the erroneous decree of the District Court refusing to set it aside, or to assert that so long as the order was in force, it was binding upon all parties and was to be treated as though it was a statute enacted by Congress. Those very things were asserted and argued in the briefs in *Baltimore & O. R. Co., vs. United States, supra*, 279 U. S. 781., as cause why restitution should not be awarded in that case. But this Court declined to sustain that defense, and declared: that the Eastside roads (there claimants in restitution) were entitled to it; that the order of the Interstate Commerce Commission there involved should have been set aside in the first instance; that as result of the refusal of the District

Court to set aside the order, the Westside roads had received the benefit of the erroneous order, and that while the parties and the controversy were before the District Court, the District Court had jurisdiction to enforce restitution and, so far as possible, to correct what had been wrongfully done.

(c). The Scope of the Authority of the Interstate Commerce Commission in Dealing with Intrastate Rates.

The power of the Interstate Commerce Commission to prescribe intrastate rates arises out of *Sections* 13 (3) and 13 (4) of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (Appendix 2, Main Brief, pages 153-5). Its powers to prescribe intrastate rates is limited to prescribing "the rate thereafter to be charged" (*Section* 13 (4); Main Brief, Appendix 2, page 154). And even then the statute in terms requires findings after a full hearing before a future rate can be prescribed (Section 13 (4)). It cannot intermeddle with State rates at all "until it makes the basic or essential findings" found lacking by this Court in the order of the Commission stricken down when this case was before this Court upon the first appeal (*Florida v. United States*, 282 *U. S., text* 215).

In *Board of Railroad Commissioners vs. Great Northern R. Co.*, 281 U. S. 412, an injunction was sought and obtained below against the enforcement of intrastate rates in aid of proceedings pending before the Interstate Commerce Commission, those rates having been attacked before that Commission upon the ground that they were so low as to

constitute a burden upon interstate commerce. But this Court declared:

> "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."

And found that:

> "A judicial restraint of the enforcement of intrastate rates although limited to the pendency of proceedings before the Interstate Commerce Commission is none the less essentially a restraint upon the power of the state to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created."

Accordingly, the Court reversed the decision of the court below with directions to dismiss this bill of complaint.

This Court in the *Great Northern case*, (supra) examined and set out in the margin at pages 426 and 427 (281 U. S.) the Committee reports to the Congress in support of

its conclusion that the intent of Congress was as stated above. Those reports and that decision clearly indicate that Congress intended to do no more than incorporate into legislative enactment the principle of the *Shreveport case* (230 U. S. 352).

The railroad company insists that the general finding in the language of the statute appearing in the unlawful order of the Interstate Commerce Commission that the intrastate rates result "in unjust discrimination against interstate commerce" was sufficient to retain vitality in the findings or order, or to give retroactive effect to findings and orders made after the unlawful order had been set aside. But the railroad company overlooks the fact that this Court upon the former appeal, after examining and setting forth the findings declared them insufficient, and in so doing said (282 U. S., text 212):

> "In the present instance, the Commission did not undertake to establish a statewide level of rates for the interstate transportation of logs, and in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion.

"In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result 'in unjust discrimination against interstate commerce'. This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a statewide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question."

Also, the theory of the Railroad Company, both in its briefs and at the bar in the former argument, was that the powers of the Interstate Commerce Commission with respect to intrastate rates were substantially identical with its powers with respect to interstate rates, and that the broad direct powers conferred by Congress in the Interstate Commerce Act, as amended, upon the Commission with respect to *interstate* rates were likewise applicable with respect to *intrastate* rates. The context of the Act itself negatives any such notion; and the Committee reports, and the reports to Congress negative any such notion (Footnote, 281 U. S. 425). It must be borne in mind that the proviso of Subparagraph 2 (a) of Paragraph (c) of Section 1 of the Interstate Commerce Act was not stricken out by the Transportation Act of 1920 or any subsequent legislation. Said subparagraph provides:

"The provisions of this chapter * * * shall not apply—

(a) To the transportation of passengers or property * * * wholly within one State * * ".

It is thus manifest that the new powers conferred by Section 13 (3) and 13 (4) with respect to intrastate rates, being limited expressly to the power to make findings *in praesenti* and orders *in futuro*, are not to be extended any further than is necessary to the exercise of those limited powers. Otherwise the proviso of Subparagraph 2 (a) of Paragraph (c) of Section 1 would be nullified. And the foregoing pronouncements of this Court clearly hold that until the basic, essential and quasi-jurisdictional findings have been made by the Commission it has no power to intermeddle with State rates and that any attempt to do so is ineffective. These and other limitations upon the power of the Commission are further demonstrated by the examination of other portions of the opinion of this case upon the first appeal, where this Court determined the invalidity of the unlawful order of the Commission, and in so doing examined the power of the Interstate Commerce Commission to operate within the domain of State power. This Court there declared:

"The (Interstate Commerce) Commission has no general authority to regulate intrastate rates, and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

And in considering the finding of the Commission in its first report that the intrastate rates assailed *were less than reasonably compensatory*, this Court said (Text 214):

> "But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of the intrastate rates lay with the state authorities, and not with the Interstate Commerce Commission".

The law is well settled that whenever the federal power (whether it be Congress itself or its subordinate body, the Commission) is exerted within what would otherwise be the domain of State power, the justification of the exercise of the federal power must clearly appear (*Florida v. United States*, 282 U. S., text 212). And this is true with respect to the Acts of Congress itself, as well as to the reports and orders of its subordinate body, the Commission. *Illinois Central R. Co. v. State Public Utilities Commission*, 245 U. S. 493; *American Express Company v. South Dakota*, 244 U. S. 617.

Applying the principles, supported by the two cases last cited and enunciated by this Court with respect to basic and essential findings upon the former appeal of the case at bar (Florida v. United States, supra) and the principles enunciated by this Court in its last pronouncement upon that subject (*United States v. Baltimore & O. R. Company*,

supra, decided January 7, 1935), it is probable that the order of the Commission was subject to collateral attack, though the attack upon it was a direct attack made in the forum prescribed by Congress and was seasonably made.

The language of the statute itself, the decisions of this Court construing it, and a consideration of the fundamental principles of our dual system of government, bring us to the inescapable conclusions:

(*a*) That the federal commission is not authorized to exert federal power within the domain of the state, unless and until it has made the necessary basic, essential and quasi-jurisdictional findings, and any attempt by it so to do without or before such findings is unlawful, invalid and ineffective.

(b) That the basic, essential and quasi-jurisdictional findings must appear upon the face of its report and order, and constitute the fundamental portion of the federal warrant by which state power is superseded.

(*c*) That the state power is paramount within state domain until the basic, essential and quasi-jurisdictional findings have been made by the federal commission.

(*d*) That if and when the basic, essential and quasi-jurisdictional findings shall have been made, and the federal warrant thus effected, the power of the Comission is confined to the establishment and enforcement "of the rate thereafter to be charged", and matters relating to the future application and enforcement of that rate.

(d). The Motion of the Railroad Company Filed in this Court to Stay the Mandates and the Operation and Effect of the Motion Either (a) in this Court or (b) in the District Court. The Effect of the Order of this Court Denying Such Motion.

The opinion of this Court on the former appeal was rendered January 5, 1931. On January 23, 1931, before the coming down of the mandates, the Railroad Company filed in this Court a motion praying, among other things, that this Court stay the mandates until the Interstate Commerce Commission should have acted further in the light of the opinion of this Court or until this Court for cause shown should otherwise direct, or, in the alternative, that this Court in sending down its mandates to the District Court direct that the status with respect to intrastate rates be maintained until the Commission should have acted, or until the District Court for cause shown should have otherwise ordered. As ground for this motion the Railroad Company, among other things, asserted that the evidence before the Commission in the original proceedings was, in the opinion of the Railroad Company, sufficient to justify findings of fact showing unlawful discrimination against persons, places and particular classes of traffic and to justify additional findings of fact to comply with the requirements of the law as stated by the opinion of this Court as to discrimination against general interstate commerce. The Railroad Company represented that it was to the interest of justice that the status fixed by the Commission's order which had been effective from February 8,

1929, be maintained until the Commission had again considered the record in the cause in the light of the Court's opinion. It asserted that otherwise demands for substantial reparations might be asserted against it with the result that great injury might be done the Railroad Company, for which there would be no relief. A motion of similar import was filed by the Georgia Public Service Commission at or about the same time. Both motions were denied by this Court on January 26, 1931.

In support of its motion the Railroad Company cited and relied upon *Smith v. Illinois Bell Telephone Co.*, decided December 1, 1930 (282 U. S. 133), and other cases of like import. The appellants there (appellees and cross-appellants here) filed a memorandum in opposition to the filing of the motions of the Railroad Company and the Georgia Public Service Commission and to the issuance of the rule sought by the motions. In that memorandum the authorities relied upon by the Railroad Company were distinguished and we particularly pointed out the difference in the questions in the *Smith Case*, supra, and the questions involved upon said motions to withhold the mandates in this case.

The *Smith Case* involved an appeal from the final decree of the Federal District Court in Illinois enjoining the enforcement of an order by the Illinois (*State*) Commerce Commission, which prescribed the rate for telephone service to Chicago. An interlocutory restraining order was entered enjoining the enforcement of the State order, and on final hearing the interlocutory injunction was made permanent. Upon appeal, this Court found that in the final decree the District Court had failed to make appropriate

findings as to the results on the intrastate business in Chicago and as to the effect of the State rates in question for each of the years since the date of the State Commission's order. Accordingly this Court reversed the final decree for further proceedings, but continued the temporary restraining order pending further action of the District Court. In our memorandum we likewise pointed out the inapplicability of the *Smith Case* and the other cases cited and relied upon by the Railroad Company, and we pointed out also that neither the Court nor the Interstate Commerce Commission could interfere with the application of a State rate upon the ground of interference with the interstate commerce until appropriate findings and orders with respect to the State rate had been made by the Interstate Commerce Commission, citing *Board of R. Rd. Commissioners of North Dakota v. Great Northern Railway Co.*, supra, 281 U. S. 412, in support of that principle. We likewise there pointed out that this Court in its opinion in the Florida case had examined the order and report of the Interstate Commerce Commission and had held in effect that the findings of the Commission were not such as to justify the exercise of Federal power and so declared that the order of the Interstate Commerce Commission with respect to intrastate rates must be set aside, and had reversed in its entirety the decree of the District Court.

It is thus seen that these proceedings before this Court upon the first appeal of this case after the handing down of the opinion and before the coming down of the mandate completely disposes of the following contentions made by the Railroad Company at the bar in the former arguments and its briefs filed consequent upon such arguments, viz.:

(a) Its contention that the defect in the unlawful order of the Interstate Commerce Commission was procedural and that such life and vigor remained in the unlawful order and the report of the Commission accompanying it as would warrant its revival ab initio, if and when the Commission made the basic, essential and quasi-jurisdictional findings at a later day;

(b) Its contention that the effect of the opinion and order of this Court upon the first decree *was to reverse the order of the Interstate Commerce Commission for error and send the case back to be proceeded with in accordance with the principles laid down by this Court in the first opinion* (sic) and in such cases and in this case the rights of the parties are determined upon the (sic) rehearing as of the date of the original complaint;

(c) Its contention that the Interstate Commerce Commission had the power to retroactively amend the invalid order or to make a new order which would be retroactive in its scope and effect.

We submit that the foregoing questions were necessarily disposed of upon the face of the supplemental proceedings in this Court. Furthermore, the decision of this Court upon the first appeal was a final decision upon the merits; for the relief sought by the appellants there (complainants below) was ordered granted by the opinion and decision of this Court. And the principle is well settled that when once the merits of a case have been decided by

this Court on appeal, the court below has no authority, without leave of this Court, to grant a new trial, a rehearing or review, or to permit any new defenses on the merits:

In re Potts, 166 U. S. 263;
In re Sanford Fork & Tool Co.,
160 U. S. 247.

(e). The Order of the Interstate Commerce Commission Made July 5, 1932, after the Time of the Shipment of the Logs here Involved Fixed Rates for Future Application. Neither that Order nor the Report Accompanying It nor Any Subsequent Order or Report Attempted to Cure the Defect in the Unlawful Order which Had Been Stricken Down by this Court. If any Attempt Had Been Made by the Subsequent Order to Supply the Findings Lacking in the Unlawful Order, Such Attempt Would Have Been Void.

Shortly after the mandates came down upon the former appeal, the proceedings before the Interstate Commerce Commission were reopened at the instance of the Georgia Public Service Commission and the Railroad Company, respectively. While neither of the petitions upon which the proceedings before the Commission were reopened are before the Court upon this appeal, it will not be asserted by the Railroad Company that either of them charged that the Cummer Scale was so low as to constitute a revenue burden upon interstate commerce. The prayers of the

petition of the Georgia Commission were not substantially different from the prayers in its original complaint. The prayers of the petition of the Railroad Company asked that the Federal Commission prescribe just, reasonable and non-discriminatory rates for transportation in intrastate commerce. Neither the Georgia Commission nor the Railroad Company sought a retroactive order or retroactive findings at the hands of the Interstate Commerce Commission. The Interstate Commerce Commission did not thereafter attempt to make findings upon the existing record in the original proceedings. The proceedings were reopened for further hearings and much additional evidence was taken. No attempt was made by the Federal Commission to begin to prescribe rates in the reopened proceedings until July 5, 1932. The findings then made spoke *in praesenti* and *in futuro* as follows, (186 I. C. C. page 189, Exhibits, page 203):

> "We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less are, and *for the future will be*, unjustly discriminatory against interstate commerce, and that such unjust discrimination can be and should be removed by the establishment etc." (Italics supplied).

Neither the order nor the report accompanying it spoke save in praesenti and in futuro. Both expressly

recognised that the Cummer Scale was in force and effect on July 5, 1932, and, more important still, the report of the Federal Commission dated July 5, 1932, confirmed the former findings of that Commission with respect to the reasonableness of the interstate rate from North Florida points of origin to Georgia destinations which had been prescribed by its former order. *—1. But neither that nor any other report or order attempted to confirm the unlawful order of the Interstate Commerce Commission which had been stricken down by this Court, or to confirm any of the findings of its former report with respect to intrastate rates, or to supply in the former report the lacking findings or otherwise to cure the defects found by this Court to be fatal to the former report and order. Indeed it is well settled that the Commission has no power to make a retroactive order except as authorized by Congress. And that the power to prescribe rates is limited to the future. And that any attempt on the part of the Commission to enter a retroactive order except to the extent authorized by Congress is void. *Baltimore and O. R. Co. v. United States*, 284 *U. S.* 195. It will thus be observed that the argument made by the Railroad Company at the bar and in its briefs upon the recent hearing before this Court to the effect that for the purpose of restitution the defects in the

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(*Note* *—1): These inter-state rates thus prescribed were not attacked and remained in effect. The Commission found in its report of July 5, 1932, that no logs had moved under them, except possibly an occasional car. 186 I. C. C. 190, Exhibits, page 204.

original proceedings had been cured in the reopened proceedings is unwarranted.

(f). The Tariff Filed by the Railroad Company with the Interstate Commerce Commission Pursuant to the Invalid Order of the Commission can Avail the Railroad Company Nothing in These Restitution Proceedings.

We think it clear that the invalid order of the Interstate Commerce Commission and the erroneous decree of the District Court were in nowise strengthened or affected by the filing by the Railroad Company with the Interstate Commerce Commission of the tariff setting forth the scale of rates prescribed by the order of the Federal Commission. The filing of the tariff was merely a means of complying with the invalid order of the Commission which the District Court erroneously refused to set aside in the first instance. The tariff was so filed solely because of the order of the Interstate Commerce Commission, as the Master found (R. 79, 91, 92). The rate itself was prescribed by the invalid order. If the District Court had set aside the invalid order in the first instance, then, of course, the tariff would have had nothing to support it. And this is true whether or not the invalid order was void ab initio, for in either view the reversal of the erroneous decree took effect as of the time when the District Court ought to have entered the right decree in the first instance, and the erroneous decree and the invalid order and everything consequent upon them went down as of that time. See authorities cited under sub-topic (b), page 19, *supra*.

The Railroad Company cites *Louisville & Nashville Rd. Co. vs. Central Iron Co.*, 265 U. S. 59, 65, and *C. B. & Q. Rd. Co. v. Merriam & Millard Co.*, 297 Fed. 1 (C. C. A. 8), to the effect that where a carrier has filed with the Interstate Commerce Commission a tariff evidencing an *interstate rate* the amount of freight charges legally payable must be determined by applying the tariff rate. There is no doubt that under the Interstate Commerce Act, as amended, carriers have the right to initiate *interstate* rates by filing with the Interstate Commerce Commission and publishing pursuant to Section 6 of the Act and in the manner prescribed therein tariffs or schedules, and that the tariffs so filed become in due course the legal rate binding alike upon carrier and shipper, unless and until such interstate rate is superseded by another legal rate, or until the Interstate Commerce Commission at the hearing shall duly prescribe the lawful rate. This principle is examined by this Court in *Arizona Grocery Co. v. Atchison T. & S. F. R. R. Co.*, 284 U. S. 370. But this case, as do those cited by the Railroad Company, deals purely with interstate rates, and this Court in the *Arizona Grocery Company Case* points out that an intrastate rate made by a State Commission has the force of a statute and cannot be modified by the carrier without application. And it cannot be contended that the filing by the Railroad Company with the Interstate Commerce Commission and publication of a tariff covering purely intrastate rates in and of itself could have force or effect upon then existing intrastate rates, unless or until the Interstate Commerce Commission shall have entered a valid order supported by basic, essential and quasi-jurisdictional findings justifying the operation of Federal

power within the domain of State power. None of the foregoing cases furnish any basis for such contention. And there is none in the language of the Interstate Commerce Act, as amended.

It is interesting to observe that the Supreme Court of Florida in a late case, *Louisville & N. R. v. Speed-Parker*, 103 Fla. 439, 137 So. 724, has declared that the laws of Florida differ from the Interstate Commerce Act in that under the former there are no such rates as carrier-made rates. See also *Reinschmidt, et al. vs. Louisville & N. R. Co.*, decided January 23, 1935, Appendix A hereof.

(g) The Railroad Company Invoked the Jurisdiction of the Court Below in Its Responses to the Motions for Restitution.

Upon the filing in the District Court of the motions in restitution by the appellees and cross-appellants, the railroad company filed responses to such motions and thereafter twice amended such responses (R. 27, 56, and 60). It expressly recognized the jurisdiction of the District Court in the restitution proceedings and invoked its injunctive process, (R. 43)

> "To the end that multiplicity of suits may be prevented, that all persons at interest be restrained and enjoined from undertaking to enforce any overcharges or claims of restitution against this respondent on account of the matters and things mentioned in said motion or in this response *except in this proceeding and before this Court*

under such circumstances as this Court may deem proper." (Italics ours).

The Railroad Company put in issue the right to restitution. Its defense asserted was upon the merits and not otherwise. True it is that in its original response (R. 42) it asserted that the Georgia Public Service Commission and the Railroad Company had filed with the Interstate Commerce Commission motions to reopen the original proceedings before it, and prayed (as it had prayed by its motion filed in this Court before the coming down of the mandates) that the mandates be not then entered, or, if entered, that the status be preserved, while the District Court

> "proceeds through its proper processes to determine in conformity with the opinion and decree of the Supreme Court that which is right and just as to the parties and to this respondent * * * * *". (R. 42).

Also, true it is that in its first amendment to its response (R. 56) the Railroad Company prayed that the District Court withhold action upon the motions for restitution until the Interstate Commerce Commission shall have acted upon the petitions to reopen the original proceedings there (R. 58). And in its second amendment to its response (filed April 15th, 1931, R. 60) the railroad company set up the order of the Interstate Commerce Commission (R. 61) which reopened the proceedings for further hearing and assigned such hearing (for the taking of testimony) before an Examiner at a future day at Jacksonville. And by

that second amendment to its response, the railroad company also declared that it was right and just that the action of the Court in the matter of restitution should be withheld pending the action of the Interstate Commerce Commission, and prayed that such action be stayed accordingly. And further prayed "such other acts, orders or decrees from this Court as may be just and right."

It is true that after the first opinion of the District Court, and after the entry of the second order of reference by the District Court, the railroad company filed a petition for decree on the Master's report (R. 181) in which it asserted that preliminary resort must be made to the Interstate Commerce Commission. But this was after the issue upon the right to restitution had been tried and decided, and after the railroad company had invoked the affirmative jurisdiction of the District Court to enjoin enforcement of any of the claims of restitution except in this proceeding and before the District Court (R. 43).

We recognize, of course, that in instances where there is a complete want of jurisdiction over the subject-matter of a controversy, jurisdiction cannot be conferred by waiver or estoppel. But we do not think that this is such an instance. The subject-matter and the parties were before the District Court in this cause. *Baltimore & O. R. Co. v. United States*, 279 U. S. 781.

And the Railroad Company, having affirmatively invoked the jurisdiction of the District Court, ought not now be heard to question that jurisdiction. *Lewis Mercantile Co. v. Klepner*, 176 Fed. 343; *Merchants Heat & Light Co. v. Clow*, 204 U. S. 286.

(h). The Appellees and Cross-Appellants Were Not Bound to Seek Reparations Before the Interstate Commerce Commission instead of Restitution before the Court. The Interstate Commerce Act as Amended Did Not Operate to Oust the District Court of Its Jurisdiction to Award Restitution or Its Duty so to do.

In *Baltimore & Ohio R. Co.* v. *United States supra*, (279 U. S. 781) the principle stated in this subheading was before this Court. That was the restitution case involving the payment of bridge tolls under an invalid order of the Interstate Commerce Commission which the District Court had refused to set aside in the first instance, and in which the District Court refused to award restitution upon the coming down of the mandate. Upon the second appeal to this Court (279 U. S. 781) the appellees, the west-side lines, in their Reply to the Appellants' statement of jurisdiction, declared:

> "For the court below to have issued a writ of restitution would be for that court to have undertaken to determine which lines should pay the bridge toll at St. Louis, Missouri. This question is a matter peculiarly for the Interstate Commerce Commission (Terminal Railroad Association v. United States, 266 U. S. 17).
>
> "If the east-side lines, appellants here, have suffered any damages by reason of complying with an order of the Interstate Commerce Commission, their remedy lies in a proceeding before

the Commission, and if they have sustained any damages for which the law allows a recovery in any other forum, they are relegated to an action at law".

This Court brushed aside those contentions of the appellees, Westside lines, and itself took jurisdiction and declared it the duty of the District Court to take jurisdiction and to award restitution. The *Baltimore & Ohio* case, supra, was decided in 1930, long after the Interstate Commerce Act was amended by the Transportation Act of 1920. The railroad company attempts to distinguish it from the case at bar by asserting that the amount of the bridge tolls was certain and it took merely a mathematical computation by a Master to determine the aggregate amount of the award in each instance.

Our reply to that contention is that in the case at bar, first, the measure of the restitution which the District Court should have awarded was the difference between the Cummer Scale and the rate prescribed by the order of the Interstate Commerce Commission, which the District Court should have set aside in the first instance; and that it is as certain and as easily computed as was the recovery in the *Baltimore & Ohio* case, *supra*. The amount of the claims of the appellees and cross-appellants computed on this basis is not in dispute. And second, that even if the District Court in awarding restitution had the right to inquire into the validity of the state rate, then that right was accompanied by a supervening duty "so far as possible to correct what has been wrongfully done". *Baltimore & Ohio R. Co.* v. *United States, supra*, 279 U. S. 781; *Arka-*

delphia Milling Co. v. *St. Louis, S. W. Ry. Co., supra, Northwestern Fuel Company* v. *Brock, supra.* And third, the second paragraph of the appellees' statement quoted next above clearly shows the contention to have been that the eastside lines were required to file a proceeding before the Commission and to there establish any *damages* which they have suffered, "by reason of complying with an order of the Interstate Commerce Commission", i. e., establish what proportion of the bridge tolls ought to have been borne by the Westside lines. And as has been shown by our analysis of the *Baltimore & Ohio Case, supra,* pages 7 to 11, this Court had established in *Terminal Railroad Assn.* v. *United States,* 266 U. S. 17, (relied upon by the Appellee Westside lines in its quoted statement, supra) the power of the Interstate Commerce Commission to prescribe the rates charged for the transfer tolls and to fix a division of the through rail rates which included the tolls, and this power of the Commission was expressly recognized in the first appeal of the Baltimore & Ohio case (277 U. S. 291) when the invalid order of the Commission was set aside. So if the point made by the appellant Westside lines had been well taken, the Interstate Commerce Commission might well have determined that in the division of the through rates, the Eastside roads should have borne part or all of the tolls. It might have done so by reopening the proceedings and considering the propriety of the division and attempting to make a retroactive finding and order as the railroad company here says (in effect) the Commission should have done in the case at bar; or, in the reparations proceedings, the Commission might have considered what proportion of the tolls should have been borne by the Eastside lines in a

division of the through rates and thus have determined the damages of the Eastside lines. But this Court held in effect that the proximate cause of the wrong sustained by the Eastside lines was the failure of the District Court to enter the right decree in the first instance, and (in effect) held that it was the duty of the Court "so far as possible to correct what had been wrongfully done".

(1) The Proceedings at Bar Are Not Founded Upon a Violation of the Interstate Commerce Act, as Amended, but Are Upon the Mandates of This Court.

It was contended by the Railroad Company in its briefs and at the bar upon the former hearing that this proceeding is one controlled by Section 13 (1) of the Interstate Commerce Act, as amended. The causes of action there authorized (or required) to be prosecuted before the Commission in the first instance are limited to those arising out of "anything done or omitted to be done * * * in contravention of the provisions" of the Interstate Commerce Act.

Paragraph (g) of subsection (3) of Section 16 defines the term "overcharges" as used in that section to mean charges for transportation service "in excess of those applicable thereto under the tariffs lawfully on file with the Commission". Section 13 (1) and paragraph g of Section 16 (3) were a part of the Interstate Commerce Act in substantially their present forms for the purpose of this argument long before the enactment of the Transportation Act of 1920. And the law is well settled by decisions prior to the enactment of the Transportation Act of 1920 that these

provisions did not relate to overcharges arising out of transactions purely intrastate. *Lummis* v. *Lehigh Valley R. Co.*, 208 N. Y. 312, 101 N. E. 907 (S. C.) 240 U. S. 43. (1916). *Penn. R. Co.* v. *Mitchell Coal & C. Co.*, 238 U. S. 251. But the Railroad Company argues that since the enactment of Sections 13 (3) and (4) by the Transportation Act of 1920, the scope of Section 13 (1) was so broadened as to deprive and relieve the District Court of its jurisdiction and duty to award restitution in the case at bar. As we point out elsewhere in this brief, the sole effect of Section 13 (4) is to empower the Interstate Commerce Commission to prescribe rates, "thereafter to be charged" after investigation and full hearing shall have been had, *and the basic, essential and quasi-jurisdictional findings shall have been made.* But the limitations in Section 13 (1) remained unchanged and they are still confined to causes of action arising out of "anything done or omitted to be done * * * in contravention of the provisions" of the Interstate Commerce Act, as amended. There is nothing in Sections 13 (3) and (4) to change them. Paragraph g of Subsection (3) of Section 16, and Section 13 (1), taken in conjunction with one another, are doubtless applicable where a carrier has filed with the Interstate Commerce Commission an interstate tariff after publication and thus established a legal interstate rate, and where the Interstate Commerce Commission shall have established a lawful interstate rate after investigation and hearing. And they may apply where the Interstate Commerce Commission has lawfully prescribed an intrastate rate *for future application* and the carrier after such order becomes effective shall have charged a rate in excess of the rate prescribed. But it cannot apply here,

where the cause of action was for a sum charged in excess of the state rate which had been collected by reason of the failure of the District Court to set aside the invalid order of the Interstate Commerce Commission in the first instance. Here the cause of action is not for a violation of the Interstate Commerce Act; it is upon the mandates of this Court. Hence, the principles laid down in the *Abilene case*, 204 U. S. 426, and other cases cited by the Railroad Company are not applicable to this point. And the principles laid down in *Penn. R. Co. v. Mitchell Coal & Coke Co.*, supra, *Lummis* v. *Lehigh Valley R. Co.*, supra, *Arkadelphia Milling Co. case*, supra, *Northwestern Fuel Co.* v. *Brock*, supra, and *Baltimore & Ohio R. Co.*, 279 U. S. 781, *supra*, are applicable and controlling.

Furthermore, an unduly high *State rate* does not violate the Interstate Commerce Act and the Interstate Commerce Commission is without jurisdiction to change such rate for either past or future application, either on the ground that it is per se too high or on the ground that it unduly prefers *interstate* commerce and unduly discriminates against *intrastate* commerce. We have already pointed out that this Court held in this very case (282 U. S. 309) that "the authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission." That the Interstate Commerce Commission has no authority to change the *state rate* because of undue preference to *interstate* commerce and undue discrimination against *intrastate* commerce is established by the language of the statute itself, and the decisions of the Interstate Commerce Commission. As has been shown, the statute provides that the

Interstate Commerce Commission may prescribe the *intrastate* rate 'to be thereafter charged" when it finds "that any such rate * * * causes any * * * undue, unreasonable, or unjust discrimination against interstate or foreign commerce." It will be noted that the statute gives no authority to change rates because of undue discrimination against *intrastate* commerce, or because the *state rate* is too high. And, in fact, Congress could not confer such power, because the power of Congress to regulate *intrastate* rates is dependent upon the effect of such rates on *interstate* commerce.

The Interstate Commerce Commission has repeatedly recognized that it has no jurisdiction to remove discrimination against *intrastate* commerce and has dismissed cases where such relief was sought. In the leading case of *Mutual Creamery Co. v. American Railway Express Co.*, 132 I. C. C. 207, after thoroughly considering the question in a case where it was asked to exercise jurisdiction to remove discrimination *against intrastate* commerce, the Interstate Commerce Commission concluded as follows:

> "Our conclusion is that an issue of undue prejudice to *intrastate* commerce and undue preference of *interstate* commerce, and of unjust discrimination against *intrastate* commerce, is not within the purview of the act we administer, and we so find. Accordingly, no consideration will be given to any of the evidence touching that issue." (Italics ours)

This construction of the law has since been consistently adhered to by the Interstate Commerce Commission.

Port of New York Authority v. A. T. & S. F. R. Co., et al., 144 I. C. C. 514.

It, therefore, is clear that if the question of the right of claimants to recover (because of the charging of the *intrastate* rates charged during the restitution period) was submitted to the Interstate Commerce Commission, the Commission would hold, and the law would require it so to hold, that it was without jurisdiction over the subject matter of the claims here asserted and without jurisdiction to afford any relief.

This point and the cases relied upon by the respective parties under it are discussed in detail in the "Supplemental Brief of Appellees and Cross Appellants", pages 53-64.

We respectfully submit that the District Court had jurisdiction to award restitution and should have exercised such jurisdiction in these restitution proceedings.

POINT II.

THE MEASURE OF RESTITUTION WHICH SHOULD BE AWARDED.

The contention of the appellees and cross-appellants is as the District Court found it to be (R. 161):

> "that they are severally entitled to have restitution measured by the Cummer Scale, it being a rate voluntarily established and approved by the Florida Commission, the Court having no power to go behind it; but if not, that the Master should be directed to measure it by the common law standard."

They contend also that if restitution be measured by the common law standard, the sums severally awarded to them are insufficient for the reasons hereinafter set forth. We discuss these contentions in the next succeeding subtopics of this brief.

(a). Restitution means Restoration, and the Fundamental theory of it Requires that the Railroad Company Restore What the Claimants in Restitution have Lost Because of the Failure of the District Court to Enter the Right Decree in the First Instance.

It was not disputed at the bar on the former argument that if the District Court had rendered the right decree in the first instance, the Cummer Scale would have been the measure of charge during the restitution period until the railroad company had taken some action in a proper forum to displace it. We respectfully submit that neither the railroad company nor the District Court had the right to speculate upon what might have taken place had the Court entered the right decree in the first instance. The railroad company intervened in the District Court as party defendant in the original proceedings and there urged that the District Court enter the decree which this Court found to be erroneous.. And the railroad company defended that wrong decree in this Court. As long as that decree remained in force and effect, the railroad company enjoyed the benefit of it and we respectfully submit that fundamental principles of restitution require that it now restore to the appellees and cross-appellants the fruits of that de-

cree. These principles and the decisions of this Court enunciating them have been so fully discussed under **POINT I**, sub-topics **(a)** to **(e)** inclusive, supra, that a further discussion of them here is unnecessary. We merely pause to point that in *Northwestern Fuel Co. vs. Brock, supra*, the erroneous judgment was upon a *contract claim*, and was reversed because the trial court was lacking in jurisdiction. But this Court ordered restitution without an inquiry as to whether all or any part of the *claim* were owing, but stopped merely to determine that it had been collected by virtue of the erroneous judgment afterwards reversed: *Northwestern Fuel Co. vs. Brock, supra; Arkadelphia Milling Co. vs. St. L. S. W. R. Co., supra; the Lincoln Gas & Electric Light Co. cases, supra, and Baltimore & Ohio R. Co. vs. United States, supra.*

(b). The Cummer Scale was the Lawful State Rate when the Interstate Commerce Commission Attempted to Supersede It With the Unlawful Order which the District Court should have set aside in the First Instance.

In the District Court the railroad company insisted that the Cummer Scale, being a Florida rate, must be tested by Florida law, and that the Florida statutes, as construed by the Florida decisions, were no more than prima facie evidence of its reasonableness and of its binding effect upon the shippers and carrier, and that it was subject to collateral attack in these restitution proceedings. The District Court adopted that view (R. 167-168) and relied upon *Pensacola & Atlantic R. Co. vs. Florida*, 25 Fla. 310,

(1895), and *Cullen vs. Seaboard Air Line Ry. Co.*, 63 Fla. 122 (1912), and *La. Floridienne vs. Atlantic Coast Line R. Co.*, 63 Fla. 208, (1912). (R. 168). It distinguished *Louisville & N. R. Co. vs. Speed-Parker, Inc.*, 137 So. 724, 103 Fla. 439 (1931) which we thinks holds the contrary (R. 168).

Since the argument of this cause in this Court (January 17th and 18th, 1935), the Supreme Court of Florida has rendered a decision which greatly clarifies this point and which we think demonstrates the error of the District Court upon this point. That case is *Reinschmidt, et al., vs. Louisville & N. R. Co.* The opinion came down on January 23rd, 1935, and a petition for rehearing having been filed, a further opinion denying that petition came down on February 9th, 1935. The opinions have not yet been reported, so a copy of each is set out in APPENDIX A of this brief. It will be observed that the Florida court there holds that where it appears that the Florida Railroad Commission has, after due notice and lawful hearing, prescribed and put into force a particular freight tariff and classification covering the freight charges to be imposed by the carrier for the haulage of a freight shipment of the particular nature and character shown or admitted by the evidence in the case, the railroad tariff is *as a matter of law*, the only applicable and controlling tariff, and the court is without the right to enter into any inquiry as to whether the prescribed Railroad Commission rate is just or reasonable, or otherwise proper. It holds that under the present law of Florida a rate cannot be collaterally attacked for unreasonableness if it is prescribed in due form of procedure by the Railroad Commission, and that it cannot be

attacked as a matter of law on grounds not going to the legality of the procedure by which the prescribed rate was arrived at by the Florida Commission in promulgating it. It cites its decision in *Louisville & N. R. C. v. Speed-Parker, Inc.* (supra) (1931). It distinguishes *Cullen vs. Seaboard Air Line Ry. Co.*, supra, and points out a legislative act enacted in 1913 which "was intended to fortify Commission-made rates so as to make them the lawful rates when arrived at by the Commission by proper procedure."

It is interesting to observe that the Florida court in the *Reinschmidt case*, supra, cited and relied upon *Louisville & Nashville R. Co. vs. Speed-Parker, Inc.*, referred to above. It is true that the Florida court in the *Reinschmidt case*, in declaring the Florida law and the binding effect of rates and classifications established by the Florida Railroad Commission, confined its statement to rates and classifications which that Railroad Commission "has after due notice and lawful hearing, prescribed and put into force." It is therefore important to examine the record and the law and see (1) whether the Cummer Scale, established by the railroad company as a voluntary rate and maintained for many years as such, was ever actually prescribed as a lawful rate after due notice and a lawful hearing, or (2), whether the railroad company, after maintaining such rate for so long a time under existing Florida law, will now be heard to deny that the Cummer Scale was the lawful rate. This we do in the next succeeding paragraph.

Rule 16 (formerly Special Rule 1) of the Florida Railroad Commission, which took effect February 1st, 1927, after notice and a hearing, adopted and confirmed the Cummer Scale as the lawful state rate. Special Rule 1

of the Florida Railroad Commission (afterwards re-numbered Rule 16, pages 1—3 of Exhibits) was adopted by the Florida Commission on January 27th, 1927, after due notice and lawful hearing, representatives of the railroad company being shown by the Rule to have been present. By that rule all rates, whether voluntarily established or otherwise, were thereby established as the rates of the Railroad Commission of Florida, and any alteration or discontinuance of them without application to and approval by the Railroad Commission was prohibited.

A rule almost identical in scope with the rule just mentioned was sustained by this Court in *Western & Atlantic R. Co. vs. Georgia Public Service Commission*, 267 U. S. 493, as a reasonable and proper rule. And the Florida Commission rule shows upon its face that it was adopted in pursuance of that decision of this Court.

A rate once established by the Florida Commission, cannot be changed except after hearing, consequent upon notice to the carrier and all persons interested (Section 6722, Compiled General Laws of Florida, 1927, our Supplemental Brief, Appendix A). This is general law with respect to a lawful rate once established after hearing. *Arizona Grocery Company vs. Atchison, T. & S. F. R. Co.*, 284 U. S. 270.

The District Court with respect to the effect of Rule 16 had this to say (R. 169):

> "Reference has been made to Rule 16 of the Commission, which adopts existing carrier rates and practices if not in conflict with the orders of the Commission and prohibits a change without appli-

> cation to the Commission. In its first aspect this rule would only effect an adoption of the Cummer Scale as a Commission rate if it were not already such. In its second aspect while providing an orderly procedure that ought ordinarily to be pursued, we think that inasmuch as the Cummer Scale had been in contention for years prior to Feb. 8, 1929, and on that date was the issue in the case brought by the Florida Commission against the Atlantic Coast Line Railroad then pending in the State court, the absence of the formality of asking permission to revoke the Cummer Scale may be considered immaterial. Particularly is this true since the issue is that the Scale is confiscatory and in violation of the Constitutions of Florida and of the United States. If it is, it ought not to be enforced for a single day over the carrier's protest."

We respectfully submit that if the District Court meant to hold that the railroad company had been contending in the preceedings before the Interstate Commerce Commission prior to February 8, 1929, that the operating results from the Cummer Scale as applied to trainloads and carloads was unremunerative, or that the railroad company proposed in those proceedings to change it, the District Court was mistaken. For the report of the Interstate Commerce Commission dated August 2, 1928, shows the contrary (Former R. 21). And the District Court overlooked the fact that the suit brought by the Florida Commission against the Railroad Company in the State Court was to enjoin the application of any rate save the Cummer Scale by the Railroad Company in intrastate commerce except

in the limited area in North Florida to which the first opinion of the District Court limited the order of the Interstate Commerce Commission, and that the gravamen of that suit was that no application had been made by the Railroad Company to the Florida Commission for leave to displace the Cummer Scale with a higher rate (Alston Exhibit No. 5 and R. 333—334).

We respectfully submit that the conclusion reached by the District Court as to the effect of Rule 16 is not consistent with the principles laid down by this Court in *Western & Atlantic R. Co. v. Georgia Public Service Commission*, supra, upon the reasonableness of the rule, and the binding effect of it, nor is it consistent with the principles laid down by this Court in the *Arizona Grocery Company case*, supra, with respect to the binding effect of a *lawful* rate; nor is it consistent with the principles laid down by this Court in *Gilchrist v. Interboro Rapid Transit Co.*, 279 U. S. 159. In the last cited case, this Court confirmed the principle already established in this Court that the Federal Courts will not inquire into the reasonableness of a state-made rate (even one for future application) until state administrative authority has been applied to and the relief there finally denied. And that it was not enough to charge that the application, if made, would be futile.

(c). Is Not the Railroad Company Estopped to Deny that the Cummer Scale was the Lawful State Rate at the Time the District Court Entered Its Decree?

The history of the Cummer Scale of rates is set out in detail at pages 55 to 59, inclusive, in our main brief en-

titled, "Brief of Cross-Appellants." Upon this sub-topic the Court is respectfully referred to those pages of our main brief. We will not enlarge upon them here save to point out that the rate has been in effect over part of the lines of the Atlantic Coast Line Railroad in Florida from 1904 forward in trainload quantities in intrastate commerce under contract made by its predecessor with Cummer Lumber Company. It was in effect over all of the tracks of the Atlantic Coast Line Railroad Company in Florida in intrastate commerce from 1914 forward. In 1914, after ten years' operating experience in trainload quantities, that railroad company entered into a new contract with the predecessors of the complainant, Brooks-Scanlon Corporation, to whom it theretofore owed no contract relations or obligations, agreeing to maintain the Cummer Scale and substantially lengthening the mileage distance to which it was applicable at rates substantially lower in proportion than the original scale for the longer haul (Main Brief 56). The Brooks-Scanlon contract was to be effective until approximately a billion feet of timber were cut and transported.

And the railroad company filed a tariff with the Railroad Commission in which it proposed to establish the Cummer Scale as a trainload rate. The Florida Commission required that the rate be made applicable to single carloads anywhere in Florida in intrastate commerce or be not maintained at all. The Florida Commission pointed out that the rates were too low and might be found to be confiscatory, but the Railroad Company elected to establish them in carload quantities applicable over all of the lines of the Railroad Company in Florida, and did so (Main Brief,

57). In 1923, after nine years additional operating experience had been had (making nineteen in all), the appellee and cross-appellant, Brooks-Scanlon Corporation desired to buy an additional one-half billion feet of timber, meaning about five years additional cut. With the consent of the Railroad Company, this additional timber was included under the Brooks-Scanlon contract, thus extending approximately five years the contract obligation to maintain the Cummer Scale (Main Brief, 58). When the original proceedings were instituted by the Georgia Public Service Commission before the Interstate Commerce Commission in 1926 the railroad company answered and defended the proceedings. In those proceedings it expressly disclaimed any contention that the Cummer Scale Rates were not compensatory (Former R. 491). It proposed a scale of rates for interstate application, but it expressly declared that it made no proposal to alter the Florida intrastate rate, and the Interstate Commerce Commission so found (Former R. 21). The Railroad Company never contended anywhere, at any time, that the Cummer Scale, under the circumstances in which it operated in Florida (mostly in trainload movements) was not remunerative or compensatory until it intervened in 1929 in the District Court in the original proceedings there in defense of the invalid order of the Interstate Commerce Commission. We respectfully submit that in the face of all this the Railroad Company was in no position in these restitution proceedings or in the court below or here to assert that the Cummer Scale of rates was not the lawful rate within the meaning of the decision of the Florida case, *Reinschmidt, etc.*, supra, and of this Court in the *Arizona Case*, supra. We submit that under Rule 16 of the

Florida Commission, supra, and, irrespective of Rule 16, it will be deemed that the Cummer Scale was the lawful State rate in force and effect in intrastate commerce in Florida until the Railroad Company applied to the Florida Commission, and there was an investigation and hearing upon that application after due notice in the manner prescribed by the Florida statute (Compiled General Laws of Florida, Section 6722) or until the State rate and State power were lawfully superseded by an order of the Interstate Commerce Commission duly supported by the basic, essential and quasi-jurisdictional findings in turn supported by evidence.

We have found no case directly in point to support this contention, but we submit that the reasoning in *Louisville & N. R. Co. v. Kentucky R. R. Co.* (D. C. Ky.), 214 Fed. 485 (S. C.), 235 U. S. 601, with respect to the presumption of reasonableness created by the voluntary establishment and voluntary maintenance of a scale of rates for a long period of time is highly persuasive of the point.

(d). Even if this Court Should hold that the Cummer Scale was Not the *Lawful* State Rate, and Had only Prima Facie effect in these Restitution Proceedings, We submit that neither the Master nor the District Court was Warranted in Finding that the Cummer Scale was Unreasonable, Non-compensatory or Confiscatory.

We think that we have demonstrated that the restitution should be measured by the Cummer Scale both under

the equities of restitution and in that that scale was the lawful state rate and could not be collaterally attacked in the restitution proceedings, but assuming (and not admitting) that the District Court was right, and that the Cummer Scale had only prima facie effect, we submit that the Master and the District Court should have held upon the whole record that the prima facie effect of the Cummer Scale had not been overcome, and that the Cummer Scale had not been shown to be unreasonable, non-compensatory or confiscatory under the circumstances in which it was operative in *intrastate* commerce in Florida.

As we have pointed out in a subsequent portion of this brief, the order of the Interstate Commerce Commission which lawfully prescribed state rates, was dated July 5th, 1932, and became effective on February 24th, 1933, and was sustained by the decree of the District Court dated February 24th, 1933, in an independent proceeding involving that order. The first report of the Master in these restitution proceedings in which he first found the Cummer scale to be unreasonable and confiscatory was filed November 14, 1932. The decree of the District Court which sustained the report of the Master and re-referred the cause to the Master with instructions to award restitution upon the common law standard was filed January 30, 1933. In none of the proceedings up until that time had these appellees and cross-appellants conducted a searching investigation into the remunerativeness or reasonableness of the Cummer Scale. They had relied largely upon what they considered to be the insufficiency of the evidence of their adversaries and confined themselves largely to analyses of the evidence produced by their adversaries. In

the original proceeding before the Commission there was substantially no cost or revenue evidence. In the reopened proceedings resulting in the order of July 5th, 1932, the appellees and cross-appellants considered that the cost evidence related not to the cost of the transportation of logs, but a system average cost, showing the average cost of transporting the average car of freight a great distance and bearing little or no relation to the cost of transporting logs, and they considered this and the other evidence before the Commission to be insufficient to warrant the Commission in making the findings which this Court found basic, essential and necessary to support a valid order prescribing intrastate rates. Upon the first order of reference to the Master in these proceedings, these appellees and cross-appellants likewise considered that upon the law and the facts presented by that record they were entitled to restitution as measured by the Cummer Scale. This court agreed with the appellants in the original proceeding.

But when the Interstate Commerce Commission and the District Court differed from these appellees and cross-appellants in the reopened proceedings and in the new suit in the District Court, and when the Master and the District Court differed from them in these restitution proceedings, these cross-appellants determined upon the order of re-reference to institute a searching investigation into the reasonableness of the Cummer Scale, and did so. The additional evidence produced upon the second reference to the Master is briefly summarized at POINT IV at pages 99 to 109 of this brief. Likewise is summarized the evidence which was before the Interstate Commerce Commission upon the original and reopened proceedings, respectively.

POINT IV at pages 90 to 98 of this brief. It is discussed in detail under POINT 7, pages 48 to 105, inclusive, of our main brief entitled "Brief of Cross-appellants."

It will serve no useful purpose to repeat those discussions at this point. We merely pause to observe the discussion under POINT IV, page 112, *infra*, where it is shown that the trainload movement was more than 50% of the total cars moved during the restitution period and more than 70% of the total claims. The difference in the percentages of cars and amounts is due to the fact that the trainload movement was much longer and consequently produced a higher revenue per car.

Our view is that the record as a whole shows:

That taking into account the large proportion of trainload movements, the character of the commodity moved, and the heavy loading, the prima facie (sic) effect of the reasonableness of the Cummer Scale had not been overcome when considering the out-turn of trainloads and less than trainloads and carloads combined, and that for this reason, restitution should be measured by the Cummer Scale.

(e). An Appeal to this Court from a Final Decree in Equity Automatically Brings up for Review all Interlocutory Orders Preceding that Decree in the Court Below.

The order of January 30, 1933, re-referring the cause to the Master, was an interlocutory order. Until the final decree was entered it was in the control of the District Court. The record as a whole upon the second as well as the first reference does not show that the prima facie (sic)

validity of the Cummer Scale had been overcome. The District Court should have awarded the restitution as measured by the Cummer Scale. And the appeal from the final decree brings here the whole record, including the interlocutory order for review. *Kendall vs. Ewert*, 259 *U. S.* 139, *Perkins vs. Fourniquett*, 47 *U. S.* 206.

(f). If This Court Should Hold that the Cummer Scale Was not the *Lawful* State Rate, and that Its prima facie effect had been Overcome so that There Was No *Lawful* State Rate, then the Restitution Must be Measured by the Common Law Standard upon the Ancient Doctrine of Quantum Meruit.

We now come to consider the measure of restitution, assuming that the Cummer Scale was not the lawful State rate within the meaning of the opinion of the Florida Supreme Court in the *Reinschmidt Case*, supra, as having been prescribed and put into force by the Florida Commission after due notice and lawful hearing, and that its reasonableness and remunerativeness can be inquired into in these restitution proceedings, and that the District Court was right in holding that its prima facie validity had been overcome and in holding that there was no lawful State rate—assumptions which we consider unwarranted.

But for the moment indulging such assumptions, then we think it clear that the measure of restitution should have been the common law standard upon the ancient doctrine of quantum meruit. The District Court thus held, and awarded restitution according to that standard. In so

doing it relied upon *Pensacola & Atlantic R. Co. v. Florida*, 25 Fla. 310 (1895) and *Cullen v. Seaboard Air Line Ry Co.*, 63 Fla. 122 (1912), and *La Floridienne v. Atlantic Coast Line R. Co.*, 63 Fla. 208 (1912) (R. 167-168).

The latter two of the three cases last referred to hold that in a suit for overcharges under the Florida Common law, as it then stood, the reasonableness of the charge exacted could be inquired into under the ancient doctrine of quantum meruit. And that the rate schedules of the Florida Commission were but prima facie evidence of the reasonableness of the charge. We have seen that in the *Reinschmidt case* (Appendix A), the Florida Court has held that where the rate in question has been prescribed and put in force by the Florida Commission after due notice and a lawful hearing, it is binding upon the shipper and carrier, and cannot be collaterally attacked for unreasonableness, citing its own decision of *Louisville & N. R. Co. v. Speed-Parker, Inc.*, supra (1931), where it was declared that in Florida all rates were Commission-made rates. And (in the Reinschmidt case) the Florida Supreme Court distinguished the *Cullen Case* by pointing out that since it was decided, the Florida Railroad Commission Act of 1913 had been enacted and that such Act was intended to fortify (Florida) Commission-made rates so as to make them the only lawful rates, when established by the Commission by proper procedure, that is, upon notice, investigation and a hearing.

But as we take it, the *Cullen case*, supra, is still the law in Florida in instances (if any there be):

Where the rate has not been prescribed by the Florida Commission after notice and hearing, and (a) where

for any reason Florida Railroad Commission Rule 16 is inapplicable or ineffective; and (b) where the Railroad Company is not estopped to deny that the rate has been lawfully prescribed by the Commission. Also, we think the principle of the Cullen case, (i. e., the right of the shipper to recover excess charges upon the issue of quantum meruit) is applicable in Florida in any instance where for any reason there is no state rate, lawful or legal.

We will now briefly consider the measure employed by the Master and by the District Court in awarding the restitution which was awarded, upon the assumption that the principles laid down in the *Cullen case* are applicable to these restitution proceedings.

(g). The Way In Which the District Court Applied the Law to the Facts in Awarding Restitution Upon the Common Law Standard. The Way in Which the District Court should Have Applied It.

As we have pointed out, the Master found in his first report upon the first order of reference (R. 86-90) and the District Court in its first opinion on that report agreed with him (R. 167, 169-170) that the Cummer Scale was prima facie the measure of restitution, but that it was unreasonable and confiscatory, and thus invalid, *so that there was in force and effect no lawful state rate*, and that restitution should be measured by the common law standard of reasonableness upon the ancient issue (as the District Court expressed it, R. 172) of quantum meruit. And the District Court recommitted the matter to the Mas-

ter for the admeasurement of it upon that basis upon the existing record and any other evidence that might be offered by the parties. In so doing, the District Court said in part (R. 171):

> "There remains only the common law standard of reasonableness as fixed by the court to be applied. Its application is not rate-making. We have held that we have no jurisdiction in this case to enjoin or set aside a state rate. A Commission rate is a legislative act made through a deputy, a law of commerce, having only a prospective operation. The ascertainment of a past overcharge is a judicial act in which law is applied, not made. Louisville & Nashville R. R. vs. Garrett, 231 U. S. 299; Prentis vs. A. C. L. Co. 211 U. S. 210; Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, 397."

The Master upon his second report confirmed his previous finding to the effect that the Cummer Scale was invalid because unreasonable and confiscatory (R. 219-220), and found that the charges exacted by the Atlantic Coast Line Railroad Company "were not proper or lawful charges, but were higher than proper or lawful charges." (R. 220). And found that each of the claimants in restitution, including the appellees and cross-appellants here, should recover 34% of the total aggregate amounts claimed by them (R. 220). This means of course no more nor less than 34% of the additional sums received by the railroad company because of the failure of the District Court to set aside the invalid order of the Interstate Commerce

Commission in the first instance. The District Court in confirming the foregoing findings of the Master said in part:

> "The original burden of proof was upon the claimants of restitution. When they showed what they had paid, and that it was in excess of the Cummer Scale, the apparent state rate, the burden shifted to the Railroad Company, which assailed the Cummer Scale, and overturned it as an obligatory rate. Under the conditions of the re-reference the burden then returned to the claimants to show what should in right and justice be restored to them, the case standing much as though they were suing in a court of law for overcharges. But the placing of the burden of proof is of no great practical importance because an abundance of evidence was offered by both sides, and the master's decision and our own goes on the evidence produced and not on the failure of either party to produce proof. * * * *. (R. 350).
>
> "The just compensation as fixed by the master, applicable of course only to these past transactions, affords reimbursement for all fair elements of cost and a fair profit. His figure approximates the intrastate rates on logs in Georgia and North Carolina, and is some lower than that in Alabama and South Carolina. We think the master's conclusion is just and we affirm it." (R. 354).

It is thus to be observed that restitution was awarded to all claimants by the same measure, irrespective of destination, volume or cost of the movement, and irrespective of whether it moved in trainloads upon regular schedules or in single isolated carloads. We have pointed out (page 59 *supra*, page 112, *infra*) that more than 50% in number of cars and more than 70% in amount of claims moved in trainload quantities on regular schedules in cars heavily loaded. Also, that the difference in the percentage of cars shipped and the amount of claims is due to the fact that the average length of haul in the trainload shipments was approximately one hundred miles, approximately twice that of the carload movements, which means of course a higher revenue and proportionately lower cost for the longer movement. Both the Master and the District Court recognized that the cost of the trainload movements was less than the cost of the carload movements (Master, R. 197-198; District Court, R. 352). But the Master found (R. 194-196) and the District Court confirmed his finding (R. 351-2) that the State and Federal statutes condemning unjust discrimination must be taken into account in applying the common law standard (C. G. L., Fla. 1927, section 6699; R. G. S., Fla., section 4616; Sections 3 and 13, Interstate Commerce Act). And the Master found (R. 197-198) and the District Court confirmed his find (R. 352) that the fact that so large a proportion of the intrastate log movement in Florida was in trainloads should be taken into account in determining a reasonable charge to be applied alike to all. In that connection the District Court said in part:

> "The master rightly concluded that a reasonable charge for carload shipments ought to be applied

to all, but to be fixed in view of the fact that much of the traffic did move in trainloads at a reduced cost and was great in volume and regular in recurrence."

We think that the Master and the District Court were wrong in applying these statutes to *past transactions* (as distinguished from future rates) when considering the issue of reasonableness, unreasonableness or confiscation. And the Railroad Company was in no position to assert the discrimination among persons upon the issue of confiscation. In our view, this Court has so held in one of its leading restitution cases. *Arkadelphia Milling Company vs. St. L. S. W. R. Co., supra*, 249 U. S., text 149. But it must be borne in mind that the discrimination between persons and localities condemned by the Federal statutes is only *unjust* discrimination. And if a movement from a particular point of origin to a particular destination is under circumstances and conditions which are materially different from the movement from other points of origin to other destinations, and with respect to the former the cost is substantially less and the volume substantially greater, a difference in the charge is *just* discrimination, and not unjust discrimination under the Florida and Federal statutes. And this is true even where the inquiry deals with the future rate, as distinguished from a past charge upon the issue of quantum meruit. *State, ex rel. Railroad Commissioners vs. Florida E. C. R. Co.*, 64 Fla. 112, 59 So. 385; *State, ex rel Railroad Commissioners vs. Atlantic Coast Line R. Co.*, 59 Fla. 612, 52 So. 4; *State, ex rel Railroad Commissioners vs. Atlantic Coast Line R. Co.*, 60 Fla. 218, 53 So. 201; *In-*

terstate Commerce Commission vs. Alabama, M. R. Co., 163 U. S. 144; *Interstate Commerce Commission vs. B. & O. R. Co.*, 43 Fed. 37; *Penn Refining Company vs. Western N. Y. & P. R. Co.*, 208 U. S. 208.

We submit that this principle is necessarily included in the decision of *Cullen vs. Seaboard Air Line R. Co., supra*, which was invoked and relied upon by the railroad company upon the hearing before the District Court upon the first report of the Master. See also *Louisville & N. R. Co. vs. Garrett, supra*. The principles here relied upon and authorities supporting them are discussed in full at **POINTS 8 TO 10**, inclusive of our Main Brief (pages 105-140), entitled "Brief of Cross-Appellants."

The evidence with respect to the cost of trainload movements and analogous movements is shown at **POINT 7**, pages 69 to 87, inclusive, of our Main Brief, and at pages 103-107, and 112-113 *infra*, of this brief.

We will not discuss them further here save to point out that our contention is not that there should be a special rate for trainloads as such, but that the fact that the movements were in trainloads operating upon regular schedules at substantially lower cost is an incident and circumstance to be taken into account in determining what a reasonable charge should be. The volume and cost of the movement are always elements to be considered in establishing point-to-point rates, and we have shown here that there are scores of point-to-point rates maintained by the railroad company at Bar and by many other railroads which are substantially lower than their general scales (*Infra*, pages 100-102).

Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company filed a separate suit in the

original proceedings. Upon the reversal of the erroneous decree of the District Court, a separate mandate came down in their case. A separate motion for restitution was filed by them. Their restitution proceeding was consolidated with the others for the purpose of convenience. Substantially all logs moving to them moved in trainloads, on regular schedules, from single points of origin, respectively, to single destinations, respectively, except with respect to Brooks-Scanlon Corporation, where there were two points of origin. No logs moved to those destinations, respectively, except to those consignees, respectively. We submit that if the principles laid down in *Cullen vs. Seaboard Air Line Railway*, supra, are to be applied here it must be determined that these shippers are entitled to have those principles applied to their shipments, respectively, and that the prima facie validity of the Cummer Scale with respect to those movements surely has not been overcome.

(h). The Measure of the Award of Restitution for the Claimants Respectively in the Event that this Court Finds that It Should be Measured Upon the Common Law Standard.

Our view is that if this Court should hold that the principles of the *Cullen Case*, supra, rather than the principles of the *Reinschmidt Case*, supra, should be applied in measuring the award of restitution, and should likewise hold that the Cummer Scale *for general application* is not the measure of the award of restitution because it is unreasonable or confiscatory or for any other reason, then our view is that the award should be measured with respect to the several appellees and cross-appellants as follows:

1. (a). That the appellees and cross-appellants Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company should be awarded restitution upon the basis of the Cummer Scale because their shipments having moved under the circumstances and conditions under which they did move, the prima facie validity of the Cummer Scale was not overcome with respect to their particular shipments; and

(b). As to the other appellees and cross-appellants and claimants, the cause should be remanded to the District Court with directions to award restitution upon the basis of the principles set forth in the next preceding sub-topic.

2. If the Court should hold that the Cross-Appellants Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company are not entitled to have the prima facie validity of the Cummer Scale applied to their particular shipments in this restitution proceeding under the principles laid down in the *Cullen Case, supra*, and the *Garrett Case, supra*, then this Court should remand the cause to the District Court with directions to award restitution to all of the several appellees and cross-appellants and claimants measured by the common law standard in accordance with the principles laid down in the next preceding sub-topic.

(1). Our View is that the Original Proceedings Before the Interstate Commerce Commission and the Original Proceedings Before the District Court, and these Restitution Proceedings Relate Only Remotely to the Revenue Needs of the Carrier. But If They Do Relate Proximately to Such Revenue Needs, the Principles Herein Set Forth Must Be applied Notwithstanding.

It is true that this Court in its opinion upon the former appeal expressed the view that the complaint by which the Georgia Public Service Commission initiated the proceedings before the Interstate Commerce Commission was broad enough to support a revenue inquiry and a revenue order in those proceedings, and in so doing said (282 U. S. text, 209):

> "If the Commission had made adequate findings supported by evidence upon the point under consideration, we should not be disposed to conclude that the order must be upset because of the manner in which the proceeding was initiated or of the generality of the allegations of the complaint."

But this Court examined the report and declared that the basic and essential findings necessary to support an order based upon the revenue needs of the carrier were lacking in the report of the Commission. And while this Court did not then examine the evidence in the original proceedings before the Commission, it examined each class of evidence referred to in the original report of the Commission

and condemned each as insufficient to support the order of the Commission. In a subsequent portion of this brief (POINT IV, pages 90 to 94) we have classified the evidence before the Interstate Commerce Commission in the original proceeding. We shall not discuss it further here, except to point out that there was no substantial revenue evidence upon the former proceeding except that relating to trainload movements which showed a profit and which was condemned by the Interstate Commerce Commission. *Florida vs. United States*, 282 U. S. 194.

The Railroad Company answered in the original proceedings before the Interstate Commerce Commission and denied any violation of the Interstate Commerce Act (Former R. 199-200). It disclaimed any contention that the Cummer Scale was not compensatory (Former R. 491). Also, it stated that it was making no proposal in those proceedings to change the level of that rate (Former R. 495-6). And the Interstate Commerce Commission so found (Former R. 21). And this Court upon the former appeal struck down the original order because it was not supported by the basic and essential findings, deeming it unnecessary to go further and determine whether there was evidence to support such findings. The original proceeding was essentially one involving alleged discriminations between persons and localities. And this Court in a subsequent case, *United States vs. State of Louisiana*, 290 U. S. 70, examined the decision upon the former appeal in the case at bar and declared that proceeding

> "was essentially one of undue prejudice against shippers confined by the evidence to rates pre-

vailing in North Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by Section 15 (a)."

So it makes no difference that the complaint was broad enough to cover a revenue case if there were no findings to support an order based upon the revenue needs of the carrier and no evidence to support such findings. And we again note that the Interstate Commerce Commission did not attempt to make the revenue findings upon the record in the original proceedings, but took voluminous additional evidence and made findings and orders in *praesenti* and in *futuro*, nearly four years later. These proceedings are upon the mandates of this Court, sent down to the District Court, and in continuation of proceedings before the District Court. *They are not in continuation of proceedings before the Interstate Commerce Commission, as the railroad company infers.* And we respectfully submit that the railroad company cannot supply in these restitution proceedings findings and evidence which were lacking in the original proceedings before the Interstate Commerce Commission.

Assuming for the sake of argument (but not admitting) that the revenue needs of the railroad company are proximately related to this restitution proceeding, there is another reason, as we see it, which precludes inquiry into the revenue needs of the carrier. The report and order of the Interstate Commerce Commission dated August 2nd, 1928, having been stricken down by this Court, there was no valid exercise of Federal power in State domain until the

order of the Interstate Commerce Commission dated July 8th, 1932, which became effective February 24th, 1933, nearly two years after the last of the logs had moved during the restitution period. We have pointed out the status of the Commission's invalid order of August 2nd, 1928 (see *United States vs. B. & O. R. Co.*, decided January 7th, 1935). And the result of the decision and opinion of this Court both upon the first appeal and upon the supplemental proceedings, and upon the railroad company's motion to stay the mandates, have been fully discussed under **POINT I-A** hereof, sub-topics (a), (b) and (c), pages 15 to 26 and 27 to 31, *supra;* what was said there is applicable here, and need not here be repeated.

We pause only to refer to *Board of Railroad Commissioners vs. Great Northern R. C.*, 281 U. S. 412, supra, where this Court considered an attempt to interfere by a Federal court injunction with the enforcement of a state rate by state power pending proceedings before the Interstate Commerce Commission, but before the Commission had made the findings with respect to unjust discrimination which are required by Sections 13 (3) and (4) of the Act to be made. It was there urged that the state rates were so low as to constitute a revenue burden upon the carrier. An injunction had been issued by the court below, but this Court examined the law and declared that it was not the purpose of Congress to interdict a state rate or interfere with state power in the enforcement of it in intrastate commerce before appropriate action taken by the Interstate Commerce Commission.

We submit that under the principles and the authorities referred to in this sub-topic, the revenue needs of the

carrier ought not to affect the measure of the award of restitution herein. Particularly is this true when we consider the action is upon the mandates of this Court to restore to the appellees and cross-appellants what they have lost by virtue of the failure of the District Court to enter the right decree in the first instance.

POINT III.

THE EFFECT TO BE ATTRIBUTED IN THESE RESTITUTION PROCEEDINGS TO THE PROCEEDINGS BEFORE AND THE FINDINGS OF THE INTERSTATE COMMERCE COMMISSION.

We come now to the third Point upon which this Court directed argument to be made, namely,

> "3. In such an inquiry what effect, evidentiary or otherwise, should be attributed to the proceedings before and the findings of the Interstate Commerce Commission.
>
> "Counsel are also requested to point out what differences if any there are between the evidence before the District Court and that before the Interstate Commerce Commission".

We assume that the Court there had reference to the original proceedings before and findings of the Interstate Commerce Commission, by which the Commission attempted to support its invalid order of August 2nd, 1928. For of the proceedings before the Interstate Commerce Commission in the reopened proceedings, only the reports,

findings and orders were before the District Court and are before this Court in these restitution proceedings. And also, the issues involved and the result sought to be accomplished in these restitution proceedings, and in the reopened proceedings were different, as we shall hereinafter show. But we are nevertheless discussing under separate sub-topics the effect which should be attributed to the proceedings before the Commission in the reopened proceedings, including the findings, as well as the effect to be attributed to the original proceedings and findings, and the differences between the evidence before the District Court and that before the Commission in the reopened as well as in the original proceedings. This we do to make certain that we comply with the directions of the Court in the event that the Court shall find that our assumption with respect to the limitations of those directions is unwarranted.

We shall now discuss, seriatim, the effect of the proceedings before and findings of the Commission under this POINT III, and under POINT IV, infra, shall examine and compare the evidence in those proceedings, respectively, with the evidence in the proceedings at bar.

(a) The Effect Which Should Be Attributed to the Proceedings Before and Findings of the Interstate Commerce Commission By Which the Commission Attempted to Support the Invalid Order of August 2nd, 1928.

The findings of the Master in his report upon the first order of reference with respect to this sub-topic were as

follows:

"11. The orders of the I. C. C., whether passed before or since the decision of the Supreme Court, are not admissible as evidence upon a hearing in this case before the Master, on the ground that they are irrelevant and immaterial. The same is true with reference to all of the findings and of all parts of the Report of the I. C. C. including the evidence introduced before the Commission. These orders, findings and report are treated as parts of the record before the Court in the case, especially in view of the statements of counsel, to show the history and status of the case. None of them have been considered by the Master in determining whether or not the Cummer Scale was unjust and unreasonable." (R. 90-91)

The statements of counsel referred to by the Master appear in the transcript of the testimony before the Master upon the first order of reference (R. 494), and it was stated by counsel for some of the appellees and cross-appellants here that the restitution proceedings were supplementary to and a part of the main proceedings, and that therefore everything in the main case which was before the District Court upon the first hearing was before the Master, but that it might be well for counsel for the respective parties to call to the Master's attention those things which they respectively wanted the Master to consider, so that he might consider them. This position was acquiesced in by counsel for the respective parties (R. 494-5). Such por-

tions of the former record as were called to the attention of the Master for this purpose were treated anew in the restitution proceedings.

The railroad company excepted to that finding of the Master's report insofar as it excluded the reports and orders of the Interstate Commerce Commission.

The District Court in its opinion and order on this report of the Master made no specific reference to that finding of the Master but overruled the exceptions to the Master's report in general terms (R. 172). But the Master in his second report, after discussing the reports and findings of the Commission dated August 2nd, 1928, and July 5th, 1932, and January 9th, 1933, admitted them in evidence, and in so doing said (R. 200):

> "The Master thinks the reports should be considered in this investigation, but nothing stated in them, including its (the Interstate Commerce Commission's) findings are binding upon the Master in considering or deciding any of the questions or issues before him".

And the Court in its second opinion (R. 351) had this to say:

> "The prior findings of the Interstate Commerce Commission in 1928 which resulted in no valid order had no legal effect and can be given only such weight and persuasiveness as their reasoning carries with it".

The evidence adduced before the Master, included in one form or another, substantially all of the evidence adduced before the Interstate Commerce Commission in the original proceeding. But we do not understand that the railroad company has here urged as error the failure of the District Court to admit or consider any evidence which was adduced before the Interstate Commerce Commission in the original proceedings. Its concern, as we understand it, is with the weight which the District Court should have given to the report and findings of the Commission in determining the right to restitution and the measure of it.

We respectfully submit that they were entitled to no weight upon either issue.

The principles here relied upon and some of the authorities supporting them are set forth under sub-topics (a) to (e) of POINT I-A, pages 15 to 34 supra. Among others, we point out the following principles and authorities:

1. That the order of the Interstate Commerce Commission which the District Court refused to set aside in the first instance was void for lack of basic, essential and quasi-jurisdictional findings required to support it, citing *Florida v. United States*, supra, and also *United States v. B. & O. R. Co.*, decided January 5, 1935, supra, where this Court examined and considered its decision upon the former appeal of this cause and the determinations there made upon the status of the Commission's order of August 2, 1926;

2. That even if the Commission's order was not void ab initio, the reversal of the decree of the District Court takes effect as of the time when the District Court

should have entered the right decree in the first instance. (*Baltimore & O. R. Co. v. United States*, 279 U. S. 781, *supra*, and numerous other cases). In the case last referred to, the defendants in restitution insisted that the invalid order of the Commission was not stayed by the appeal from the erroneous decree of the District Court refusing to set it aside, and so, until set aside, was binding upon all parties as though it were a statute enacted by Congress. But this Court brushed aside that contention and ordered restitution to be awarded. (Sub-topic (b), POINT I-A, page 19 *supra*);

8. That the power of the Commission to prescribe intrastate rates is by the very language of Section 13 (4) of the Act itself limited to rates *thereafter* to be charged. (sub-topic (c), POINT I-A, page 20, *supra*).

And in discussing the scope of the authority of the Interstate Commerce Commission to deal with intrastate rates (sub-topic (c), POINT I-A, page 20, *supra*), we point out the following principles:

(a) That under the decisions of this Court, the Interstate Commerce Commission was without authority to intermeddle with state rates until it had made the basic, essential and quasi-jurisdictional findings which this Court found were lacking in the original proceedings in this case, relying upon the principles laid down by this Court in *Florida v. United States*, *supra*, and *United States v. B. & O. R. Co.*, decided January 5, 1935, *supra*;

(b) That the theory of the Railroad Company is that the power of the Interstate Commerce Commission to make intrastate rates was substantially identical with its power to make interstate rates. Not only were the limitations in

the language of Section 15 (4), conferring powers to make findings *in praesenti* and prescribing *future* rates inconsistent with that theory, but the proviso of sub-paragraph 3a of paragraph (3) of Section 1 of the Interstate Commerce Act, which declares that the provisions of the Act shall not apply to transportation of passengers or property wholly within one State, was still in force and effect. (Sub-topic (c), POINT I-A, pages 20, 23-24, *supra*).

(d) The unsoundness of the theory of the Railroad Company on this point is clearly demonstrated by pertinent quotations from the opinion of this Court upon the former appeal of this cause. (Sub-topic (c), POINT I-A, pages 24-26, *supra*). We there referred to *Illinois Central R. Co. v. State Public Utilities Com.*, 245 U. S. 493, cited by this Court with approval upon the former appeal of this cause, to the effect that wherever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear.

We think that in considering the effect which should be attributed to the proceedings before and findings of the Interstate Commerce Commission in the original proceedings, it is pertinent to consider the effect of the order of this Court which denied certain motions filed by the railroad company and by the Georgia Public Service Commission after the coming down of the opinion of this Court upon the first appeal of this cause, and before the going down of the mandates. That opinion came down on January 9th, 1921. The motions were filed in this Court on January 22nd, 1921, and were denied by this Court on January 26th, 1921. The motions and the effect of them are

discussed in some detail under sub-topic (d) of POINT I-A, pages 27 to 31 *supra*) of this brief, to which reference is here made. What was said there is applicable here.

We pause but to add that both motions declared that there was then before the Commission evidence upon which it could make the basic and essential findings which this Court found lacking to support the Commission's order. And both motions sought to stay the mandates in this Court until the Interstate Commerce Commission should have acted, or until this Court for cause shown should otherwise have directed, or in the alternative, that this Court in sending down its mandates to the District Court direct the District Court to maintain the status as to the intrastate rates until the Commission should have acted or until the District Court, for cause shown, should have otherwise ordered. And as grounds for its motion, the railroad company set up in effect that a large quantity of logs had moved in intrastate commerce pending the original appeal from the erroneous order of the District Court, and declared that demands for substantial reparations might be asserted against it with the result that great injury might be done the railroad company for which there would be no relief.

We respectfully submit that the motion of the railroad company would not have been denied if it had been sufficient to warrant the stay of the mandates, or to warrant any qualification in or of the mandates by this Court when they were transmitted to the District Court to control the action of the District Court in the further proceedings which were ordered.

And if the proceedings before and findings of the Commission were to be attributed any force or effect in the

restitution proceedings had under the mandates, as forecast by the railroad company, then the motion of the railroad company was an appropriate way to determine that question or to obtain authority for the District Court so to do. But the motion in all of its aspects was denied by this Court, and if the railroad company had causes other than those set forth in its motion seeking to amend or qualify the terms of the mandates with respect to the restitution proceedings to follow under them, such causes were omitted from the motion at the peril of the railroad company. *In re Potts*, 186 U. S. 263. These are not continuations of the proceedings before the Interstate Commerce Commission, but are proceedings upon the mandates of this Court, and in continuation of the proceedings before the District Court, (*infra* sub-topic (d), page 88).

We therefore respectfully submit that neither the proceedings before nor the findings of the Interstate Commerce Commission upon which the invalid order was based can be attributed any weight, evidentiary or otherwise, in these restitution proceedings.

(b) The Effect Which Should be Attributed to the Proceedings Before, and the Findings of, the Interstate Commerce Commission by Which the Commission Supported its Order of July 5th, 1932.

The order of the Interstate Commerce Commission dated July 5th, 1932, was made nearly four years after the invalid order of the Commission, which this Court ordered set aside. It took effect nearly two years after the last of

the shipments of logs involved in these restitution proceedings. It was entered after the evidence in the original proceedings had been supplemented with a large amount of testimony and evidence. The record in the reopened proceedings was not before the District Court in these restitution proceedings and is not before this Court upon these appeals and cross-appeals. The order re-opening the proceedings before the Interstate Commerce Commission was entered after the mandates upon the first appeal in this cause had come down. The relief sought in the re-opened proceedings and the relief sought in these restitution proceedings is not the same relief. That sought in the reopened proceedings before the Commission was the exercise by the Commission of its power to prescribe intrastate rates *for the future*, and the making of basic and essential findings of fact in praesenti (after the coming down of the mandates) which would support the prospective order prescribing rates. These restitution proceedings are a continuation of the proceedings in the District Court and are upon the mandates of this Court, and seek the restitution of sums paid to the railroad company *in the past* by the appellees, cross-appellants and claimants, by reason of the failure of the District Court to enter the right decree in the first instance.

It is true that the whole record in the re-opened proceedings was before this same District Court in *Florida v. United States*, 4 Fed. Supp. 477, decided February 24, 1933, and was likewise before this Court upon an appeal from that decision in *Florida v. United States*, 292 U. S. 1, decided April 2, 1934. But those proceedings before the District Court and that appeal were a separate and independ-

ent suit to which some, but not all, of the appellees and cross-appellants were parties. It is true that substantially all of the evidence which was before the Interstate Commerce Commission upon the re-opened proceedings was before the District Court in these restitution proceedings (infra, page 98). But it is also true that there was before the District Court in these restitution proceedings a large amount of additional evidence adduced by these appellees and cross-appellants upon the issue of the reasonableness and remunerative character of the Cummer Scale. The Interstate Commerce Commission had concluded its investigation and made its report and order before the District Court entered its opinion upon the first reference (R. 169 et seq.) and re-referred the matter to the Master. The final opinion of the District Court was entered more than a year after the Interstate Commerce Commission had concluded its investigation and report, and it was entered upon evidence which had been adduced on the re-reference after the Interstate Commerce Commission had concluded its investigation and report. No part of the record in the re-opened proceedings before the Interstate Commerce Commission was offered before the Master except the reports and findings of the Commission in such proceedings. The Master admitted the reports and findings in evidence and, in so doing, said (R. 200):

> "The Commission has had much experience in rate making. In its reports it discussed and criticized computations of some expert witnesses and stated computations and findings of its own. The Master thinks the reports should be con-

sidered in this investigation, but nothing stated in them, including its findings, are binding on the Master in considering or deciding any of the questions before him."

The District Court, in its conclusions of law upon this aspect of the Master's Report, had this to say (R. 351):

"The prohibition of federal law aimed at discrimination by state rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem. Nevertheless we agree with the master that the decision of the Interstate Commerce Commission on July 5th, 1932, that the Cummer scale resulted in discrimination against interstate commerce as respects the carrier's revenues and that for the future a state rate conforming to the interstate rates on logs be applied has no retroactive effect and does not constrain a finding that in 1929 and 1930 the interstate rates were the only just and reasonable charge in this intrastate traffic. * * * .

"There is, of course, no rigid necessity for intrastate rates to conform with interstate rates.

> They frequently do not conform, and where there is divergence it becomes a question which are the more just and reasonable." (*Note* *—2).

It is thus to be observed that the Master and the Court admitted and gave weight to the reports and findings of the Commission in the reopened proceedings, though both found that they were not conclusive in these proceedings.

We respectfully submit that to the extent which the Master and the Court found that the report and findings in question were entitled to weight they were wrong, and to the extent that they found that they were not conclusive they were right. Neither the Railroad Company nor the Georgia Public Service Commission nor anyone else in the re-opened proceedings prayed that the Interstate Commerce Commission make a retroactive finding or order affecting the state rate. The pertinent context of the order is set forth under sub-topic (e) of POINT I-A, supra. The order in its entirety is set forth as Appendix B to our brief, entitled "Supplemental Brief of Appellees and Cross-Appellants", filed before the recent argument in this Court. The Commission, in its findings of July 5, 1932, confirmed its findings made August 2nd, 1928, with respect to the *interstate rate* from North Florida points of origin to Georgia destinations (186 I. C. C. 157, Exhibits page 203); but the Commission neither in that nor in any other Report or or-

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(*Note* *—2)—The Interstate Commerce Commission found that there was no *interstate* movement from Florida to Georgia, except possibly an occasional car (186 I. C. C., text 199, Exhibits, page 204).

der attempted to confirm the findings in the original proceedings which attempted to condemn the intrastate rate. For having no power to make the basic, essential and quasi-jurisdictional findings save in praesenti or to prescribe intrastate rates for application save in the future, it did not attempt to exercise such power. Indeed, in its report and finding of July 5, 1932, it expressly recognized that the Cummer Scale was then applicable in Florida. There its condemnation of them was *in praesenti* and *in futuro*. If the Commission had attempted to make a retroactive finding and order it would have been void. *Baltimore & Ohio R. Co. v. United States*, 284 U. S. 195, supra.

The principles just considered are more fully discussed in sub-topic (e) of POINT I-A (page 31, supra) of this brief.

(c) A Determination Even by the Judicial Branch of the Government That a Rate for Future Application is Non-Compensatory is Entitled to No Weight in Awarding Restitution Consequent Upon a Former Decree which Had Been Reversed.

The very principle stated in this sub-topic was enunciated by this Court in *Ex Parte Lincoln Gas & Electric Light Co.*, 257 U. S. 6. There an order had been entered by a District Court holding a rate to be non-compensatory, but upon appeal the decree of the District Court was set aside. Afterwards, and pending the restitution proceedings, a new suit was brought and a new injunction issued against the enforcement of the rate which had been condemned by the

reversed decree. In the restitution proceedings under the mandate of this Court which reversed the original decree, it was urged that the new suit and the new injunction issued by the District Court precluded the recovery in the restitution proceeding. But this Court, when the cause was again before it (on mandamus), declared (257 U. S. 9):

> "The beginning of the new suit, and the granting of a restraining order therein, can properly have effect only with respect to the then future operation of the ordinance and cannot affect the measure of recovery to be applied by the District Court in awarding restitution for the period covered by the former suit; much less its jurisdiction to award such restitution." (Citing cases).

We respectfully submit that the principles enunciated in the *Lincoln Gas & Electric Company* case, supra, are applicable here. See also *Board of Commissioners against Great Northern R. Co.*, supra, where sections 13(3) and (4) of the Interstate Commerce Act were under consideration, and *Anniston Manufacturing Co. v. Southern Railway*, Southern 965.

(d) These Restitution Proceedings Are Not in Continuation of the Proceedings before the Interstate Commerce Commission But Are upon the Mandates of this Court in Continuation of the Original Proceedings in the District Court.

We respectfully submit that while the principle stated in this sub-topic is fundamental and inescapable, it is not

recognized by the Railroad Company. The proceedings in the District Court which involved the invalid order of the Interstate Commerce Commission were not appellate proceedings, but were original proceedings to test the validity of the order of that Commission. The District Court had no jurisdiction to amend it or to direct the Commission to enter the order which it should have entered in the first instance. Its jurisdiction was to sustain it if it was valid, and to enjoin, set aside or annul it, if it was invalid. It could not supply the missing basic and essential findings which the Court found lacking to support the Commission's order.

All of this being true, it is manifest that the District Court could not in these proceedings upon the mandates give effect to an order entered nearly four years after the entry of the one which had been declared invalid and set aside. This would be true even if the Commission had attempted to give its findings or order of July 5, 1932, retroactive operation and effect (Sub-topic (e), POINT I-A, page 81, *supra*), and, the Commission having made no such attempt, we submit that the matter is concluded.

(c) The Orders and Findings in the Reopened Proceedings Did Not Revive or Give Effect Ab Initio or Otherwise to the Invalid Order of the Commission, or Supply the Basic, Essential and Quasi-Jurisdictional Findings Which were Lacking in the Original Proceedings.

The principles stated in this sub-topic have been discussed under appropriate sub-topics in POINT I-A, supra,

and in the sub-topic next preceding this one. The Commission had no power to accomplish any such purpose and made no attempt to do so.

We respectfully submit that neither the proceedings before or findings of the Interstate Commerce Commission which resulted in the Commission's order of July 5, 1932, can be attributed any weight, evidentiary or otherwise, in these restitution proceedings.

POINT IV.

THE DIFFERENCES BETWEEN THE EVIDENCE BEFORE THE DISTRICT COURT AND THAT BEFORE THE INTERSTATE COMMERCE COMMISSION.

(a) The Evidence in the Original Proceeding Before the Interstate Commerce Commission.

We shall first briefly outline the evidence which was the basis of the order of the Interstate Commerce Commission of August 2, 1928. It will be recalled that in that proceeding, the Georgia Public Service Commission was complainant and the Atlantic Coast Line Railroad Company was defendant. Some of these appellees and cross-appellants were intervenors in that case, though others took no part in it. The proceeding there was one in which the complainant made it clear that the end sought to be achieved by it was the extension of the then existing Florida intrastate scale of rates (the Cummer Scale) interstate from Florida to Georgia (Former Record 417-419). And the

complainant there stated in terms that it was "not a revenue case". (Former Record 417). The defendant, by its answer, denied that there was any violation on its part of the Interstate Commerce Act and prayed to be dismissed (Former Record 200). The defendant carrier likewise stated that it was not taking the position that the Cummer Scale of Rates was not compensatory (Former Record 491), and it made no proposal of any change in the Cummer Scale of Rates (Former Record 495-496), and the Interstate Commerce Commission so found (Former Record 21). This Court, in a subsequent decision, declared that it was "essentially one of undue prejudice against shippers confined by the evidence to North Florida" *United States v. Louisiana*, 290 U. S. 70.

The evidence in the original proceeding consisted of:

(a) Comparisons of the Cummer Scale of Rates with various other scales of log rates, interstate and intrastate and with various scales of rates on lumber and various low grade commodities.

(b) Comparisons were likewise made of the revenue or earnings per car and per ton on logs under the Cummer Scale of Rates and on logs under other scales of rates and on various other low grade commodities under the scales of rates applicable thereto.

(c) The origin of the Cummer Scale was set forth, and the method of its operation with respect to the trainload shipments of certain shippers in large volume in Florida was ex-

plained, the contracts for the handling of such shipments in trainloads having been put in evidence.

(d) The large lumber companies in Florida produced evidence as to the investments which they had in timber and in their plants and the quantities of logs which had been shipped to them during the period of several years then next preceding.

(e) The large lumber companies in Florida produced testimony to the effect that any substantial increase in the Cummer Scale of rates would compel them to abandon their plants and establish their mills in the timber.

(f) There was also testimony as to what shipments from Florida to Georgia might be produced by a parity of rates and what timber there was available in Florida for such shipments.

(g) There were two cost studies of the trainload movement of Brooks-Scanlon Corporation from Perry and Carbur, Florida, to Eastport, Florida, one produced by the Atlantic Coast Line Railroad and the other produced by the Florida Railroad Commission, *and both showing the Cummer Scale of rates as applied to that trainload movement to be compensatory.*

Briefly stated, this is all of the evidence there was before the Commission in the initial proceeding. It is made up of 53 exhibits and the narrative statement of the testimony aggregates 326 pages of the record (Former Record 401-727).

Substantially all of this evidence was reviewed by this Court in its opinion declaring the Commission's order to be invalid (282 U. S. 194-215). At pages 205-206 of that opinion the history of the Cummer Scale was reviewed. The Court pointed out (page 213) that the cost studies were found by the Interstate Commerce Commission to have been based on "arbitrary assumptions" (that is, they related only to the trainload shipments of a single shipper), and that they could not be accepted "to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida". The Court further referred (page 213) to the rate comparisons and the comparisons of the earnings under the rates so compared, and said "the 'earnings' thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distances". The Court then pointed out that upon these rate comparisons, the Commission had reached the conclusion that the Cummer Scale of rates was "less than reasonably compensatory" (page 213). But the Court said that it was not enough for the Commission to find that the rates were not remunerative or reasonably compensatory, and that "the authority to determine the reasonableness per se of intrastate rates lay with the State authorities and not with the Interstate Commerce Commission", (page 214). The Court thus exhausted all of the classes of evidence which were before the Commis-

sion and went on to state (page 214), "that the raising of rates does not necessarily increase revenue" and referred to the testimony of the Florida intervenors that any material increase in the rate would cause them to move their plants to the timber or abandon operations. The findings which the Commission should make were then pointed out (pages 214-215).

When this order was declared invalid the following things occurred: (a) the Cummer Scale was again applied to intrastate shipments in Florida; (b) the appellees and cross-appellants here sought restitution from the District Court on account of the shipments which they had made during the time that the invalid order of the Interstate Commerce Commission had been effective; and (c) the Interstate Commerce Commission re-opened the original proceedings.

(b) The Evidence in the Re-Opened Proceeding Before the Interstate Commerce Commission.

The Interstate Commerce Commission did not undertake to make any order upon the evidence which it had already taken, and we think it is clear from what has been above stated that it could not have done so. It took more evidence.

In the re-opened proceedings before the Interstate Commerce Commission, the Atlantic Coast Line Railroad Company produced the following evidence:

(a) Comparisons of the Cummer Scale of Rates and the earnings per car-mile and per ton-mile thereunder with other scales of rates on logs and numerous other commodities and

the earnings per car-mile and per ton-mile under such scales of rates.

(b) Estimates of the amount of standing timber and the rate of re-growth of timber in the State of Florida.

(c) A statement showing the quantity of logs hauled intrastate in Florida by the Railroad during most of the period when the invalid order of the Interstate Commerce Commission was in effect, viz., from February 9, 1929, to January 31, 1931, and the points between which such logs moved and the revenue received therefrom. Also a statement of the quantity of logs moved in Florida in the period from February 1, 1931, to June 30, 1931 (during part of which time the Cummer scale had been restored) and showing the points of origin and destination of such logs but not the revenue derived therefrom.

(d) Computations (prepared by Mr. Lamb, the General Auditor of the Railroad Company) purporting to show the cost of handling logs intrastate in Florida based upon average out-of-pocket costs per ton-mile and per car-mile of handling all freight in Florida.

(e) At the request of the Florida lumber companies, the railroad also produced a statement with respect to the log movement of the Wilson Cypress Company between Hines

and Palatka, Florida, for the month of November, 1930, showing the consist of the log trains and the out-of-pocket costs thereof.

And these Appellees and Cross-Appellants produced the following evidence:

(f) Criticisms of the cost studies above mentioned which were produced by the railroad, but no affirmative cost evidence.

(g) Analyses of the logs which had moved in Florida during the period of the effectiveness of the high rate prescribed by the invalid and unlawful order of the Interstate Commerce Commission, and evidence to show that the effectiveness of that order had caused large losses in the investments of the lumber companies and had destroyed or was rapidly destroying the traffic in logs intrastate in Florida on the Atlantic Coast Line Railroad.

Upon this evidence the Interstate Commerce Commission entered its report and order of July 5, 1932 (186 I. C. C. 157; I. C. C. Record 27-28). (*—s). The order (I. C. C. Record 78-79) required the Railroad "to establish, put in force, and maintain" the rates which were therein prescribed. On July 28, 1932, the order was amended so that it "shall become effective on or before September 15, 1932", upon not less than thirty days notice by the railroad to the

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(*—s). (I. C. C. Record—) refers to the record of the case reported in 292 U. S. 1.

Interstate Commerce Commission and to the general public by the filing and posting of tariffs (I. C. C. Record 79-80).

Thereafter these appellees and cross-appellants filed petitions to re-open the proceedings, setting forth in such petitions that various southern rail carriers had recently reduced their log rates to substantially the level of the Cummer Scale. The Interstate Commerce Commission re-opened the proceeding "for the sole purpose of receiving evidence respecting any change in the rates on logs since the close of the previous hearing, the circumstances connected with and the conditions which occasioned such changes, and whether such circumstances and conditions, or any of them, are present with respect to the Florida intrastate log rates of defendant" (I. C. C. Record 363). Upon the re-opened proceedings, the evidence was limited to certain tariffs which had been recently filed by various southern rail carriers, which tariffs published rates (hereinafter referred to as the "newly reduced rates") on substantially the level of the Cummer Scale. Those "newly reduced rates" were then effective upon the lines of the carriers, the log rates of which had been compared with the Cummer Scale.

The Interstate Commerce Commission, by its report and order of January 9, 1933 (190 I. C. C. 588, I. C. C. Record 361-377), found that these "newly reduced rates" were on substantially the level of the Cummer Scale (I. C. C. Record 363), but that there was no occasion for applying them in Florida on the lines of the Atlantic Coast Line Railroad. It thereupon made its order effective as of February 11, 1933, and subsequently postponed the effective date to February 25, 1933 (I. C. C. Record 377).

We shall now examine the evidence before the District Court.

(c) The Evidence Before the District Court on the First Reference to the Master Was Substantially the Same as That Before the Interstate Commerce Commission.

On the first reference to the Master, the Atlantic Coast Line Railroad Company put in evidence the same evidence which it had produced before the Interstate Commerce Commission as above described. Almost every one of the identical exhibits which it had produced before the Interstate Commerce Commission were produced by it before the District Court. These appellees and cross-appellants produced some of the "newly reduced rates" above referred to. Thus, upon the original reference before the Master, the evidence before him and the evidence before the Interstate Commerce Commission was substantially the same. In addition to the above evidence, there was evidence from both sides with respect to the various litigations and orders which had arisen out of the original decision of the District Court confining the application of the order of the Interstate Commerce Commission to the northern portion of Florida. All those litigations and orders were found by the Master, both as a matter of fact and of law, to be nugatory and void as affecting the restitution here sought. On the basis of the evidence above mentioned and which was, as we have above stated, substantially identical with that produced before the Interstate Commerce Commission, the Master found and the Court confirmed the finding that the

Cummer Scale was confiscatory and therefore could not be used as the measure of restitution to be here awarded. This is the first opinion (R. 159-173) of the District Court from which the appeal and cross-appeal are here taken. It was filed Jan. 30, 1933, after the Interstate Commerce Commission had concluded its investigation and reports.

(d) The Evidence Before the District Court Upon the Re-reference to the Master, and the Difference Between that Evidence and the Evidence Before the Interstate Commerce Commission.

When the District Court on January 30, 1933, re-referred the cause to the Master with directions to ascertain what was the reasonable charge to be made as measured by common law standard and to award restitution on that basis, these appellees and cross-appellants undertook to make out a case upon the merits with respect to the Cummer Scale. This they had never undertaken to do in any other proceeding on, before any other tribunal, administrative or judicial.

The claimants made a most extensive investigation of log rates for the purpose of comparisons. They produced upwards of a hundred tariffs (Claimants' Exhibits No. 1-A to No. 12-A-2, No. 17-A, No. 19-A, No. 21-A, No. 23-A, No. 25-A, No. 27-A, No. 31-A, No. 33-A, No. 35-A, No. 37-A, No. 39-A, No. 41-A and No. 93-A) showing log rates many times that number. At least half of those log rates were substantially on the level of the Cummer Scale. All of them were substantially lower than the rates prescribed by the

order of the Interstate Commerce Commission. These comparisons showed log rates which had been in effect on the Atlantic Coast Line Railroad during the restitution period which were substantially on the level of the Cummer Scale, some being even lower than that scale. The "newly reduced rates" were also shown in evidence with many additional ones which had since become effective. It was likewise shown that there were many such rates, which had been in effect in Southern territory during the restitution period.

The Atlantic Coast Line Railroad, throughout the period here involved, had certain point-to-point rates, applicable from 85 points of origin to 13 destinations, between points in North Carolina and Virginia, which point-to-point rates were on substantially the same level as the Cummer Scale and applied only between those particular stations (pages 14-16 of Exhibits).

The Atlantic Coast Line Railroad had another scale of rates applicable to logs in Florida from 231 points of origin to 21 points of destination (See Claimant's Exhibits 27-A, 28-A, pages 25-26 of Exhibits). The log rates last mentioned were established more than twenty years ago and were first gathered together in the form of a tariff in 1912 (R. 1149), and only a few days before this proceeding commenced, these log rates last mentioned were cancelled by the Railroad. It will be observed that the rates last mentioned, applicable from 231 points of origin to 21 points of destination in Florida, were generally only a little higher than the Cummer Scale and in a few instances lower than the Cummer Scale (Page 26 of Exhibits).

Likewise a number of trainload rates were found and produced (Claimants' Exhibits 52A, 55A, 56A, R. 761-762,

R. 765-766, and R. 796-797), all of them being lower than the Cummer Scale and several of them having been effective on the Atlantic Coast Line Railroad between particular points.

None of these rate comparisons, except some of the "newly reduced rates", had been produced before the Interstate Commerce Commission.

The Master commented upon the fact that railroads frequently made low rates for the inbound raw product when they secured the shipment of the outbound manufactured product (R. 202). And the Interstate Commerce Commission, in commenting upon the "newly reduced rates" which it found to be on substantially the level of the Cummer Scale, said:

> "It is clear from the record * * * that while these rates standing alone would not be attractive to these carriers from a revenue standpoint, they are attractive when coupled with the rates for the outbound movement of the manufactured product". (190 I. C. C. 592; page 162 of Exhibits).

On this re-reference before the Master, these Appellees and Cross-Appellants showed that the lumber manufactured from the logs shipped to Wilson Cypress Company was shipped out over the Atlantic Coast Line Railroad, and that the average length of the outbound haul of that lumber was 381.6 miles over the lines of the Atlantic Coast Line and its subsidiaries (R. 769-770). They also showed that the lumber manufactured from the logs shipped to the Cummer Cypress Company was shipped out over the lines

of the Atlantic Coast Line Railroad and that the average length of the outbound haul of that lumber was 807 miles over such railroad and its subsidiaries. The length of the outbound haul was more than three times that of the inbound (R. 827-828). The contracts between the trainload shippers and the Atlantic Coast Line Railroad required this re-shipment over that Railroad, unless the rates of competing transportation companies were lower (Former Record 334; pages 51-55 of Exhibits). Those two appellees shipped more than fifty per cent of the logs transported during the restitution period and their claims aggregate more than seventy per cent of the total claims. All of this evidence with respect to the actual re-shipment of the lumber by Wilson Cypress Company and Cummer Cypress Company, the trainload shippers, and the length of the outbound haul of the lumber, was produced before the District Court but was not before the Interstate Commerce Commission.

Before the Interstate Commerce Commission, these appellees and cross-appellants introduced no affirmative cost evidence and merely criticized the cost studies above mentioned made by the Railroad. Before the District Court, these appellees and cross-appellants produced most extensive cost studies with respect to the handling of logs in Florida (See Claimant's Exhibits 70-A to 84-A; pages 75 to 98 of Exhibits, and testimony of the witness, Saunders, R. 893-936 and R. 1249-1266). These cost studies were made and produced by Mr. Henry J. Saunders, a statistical and accounting analyst, who had been with the Interstate Commerce Commission from 1914 to 1928 and had been in charge of all cost work in connection with the Bureau of Valuation of the Interstate Commerce Commission (R.

894). His extensive experience and thorough qualification for the preparation of such cost analyses appear at pages 893-895 of the record.

Mr. Saunders, in certain of his exhibits above referred to, (Claimant's Exhibits 79-A, 82-A; pages 86-90 of Exhibits), has undertaken to determine the cost of this log traffic in Florida during the period here involved, giving effect to the fact that more than half of it was in trainloads and thereby following the principle found proper by the Master and the District Court. We shall not elaborate upon his methods except to say that they are carefully and in detail explained in those exhibits and in his testimony (R. 893-936).

Mr. Saunders thus found that the total cost or revenue which should have been derived from the entire log traffic here involved, including the same rate of profit which was earned on all other traffic of the railroad, was $141,310, or $13.19 per car. He stated that the revenue for the same average car during the same period under the Cummer Scale would have been $13.05 (See Exhibit 82-A, page 96 of Exhibits).

Mr. Saunders likewise made extensive cost studies with respect to the particular trainload shipments of Wilson Cypress Company and Cummer Cypress Company (Claimant's Exhibits 70A, 71A, 72A, 73A, 75A, 76A, 77A, 78A and testimony relating thereto).

With respect to the trainload shipments of Wilson Cypress Company (more than half in amount of the claims here involved), the out-of-pocket costs in November, 1930, (said by the railroad to be a typical month) were shown to be $4.81 per car (Lamb Exhibit 23; pages 125-126 of Ex-

hibits). The rate paid produced a revenue of $41.60 per car, and the Cummer Scale would have produced a revenue of $20.48 per car (R. 211-212). We realize that the out-of-pocket costs are far from being all the costs, but where the out-of-pocket costs were only $4.81 per car and the revenue under the Cummer Scale was $20.48 per car, it takes a great many indirect costs to make the rate confiscatory.

With respect to this same trainload movement in that same month, the Railroad made a computation of total costs per car. Referring to that computation the Master found (R. 211-212):

> "In the computation of Mr. Lamb on the Hines to Palatka movement, during the month of November, 1930, he found the total handling expenses of this movement from Hines to Palatka at $18.32 per car, and when to this amount was added $2.82 per car for Florida taxes, and $6.04 as representing a proportionate share of interest on investment at 5¾% the total would be $27.18 per car".

The Master found (R. 218) that the Interstate Commerce Commission had made a computation of the cost of this same trainload movement resulting in a total cost per car (including 5¾% return) of $27.52. (*Note* *—4).

With respect to the evidence before the District Court the Master found (R. 219):

(*Note* *—4)—In its report of July 5th, 1932, in the reopened proceedings (186 I. C. C. 182, page 196 of Ex-

"In the record there are calculations of others which estimate the total haulage cost to be less than the estimates made by Mr. Lamb and the I. C. C. above referred to. Some were much less. If they were treated as correct, the return on investment from the revenue received would be shown to be very high. For instance, Mr. Saunders, a witness for claimants, in his computation of the Hines to Palatka movement, after eliminating charges for transporting company coal, found the cost per car $14.11, and after eliminating other out-of-pocket expenses, which he said should be eliminated, found the cost per car $12.11. After adding to the former $2.52 for taxes, and $4.65 for 5¾ on investment, his figure was $31.28,* and after adding to the latter $2.11 for taxes and $3.99 for interest on investment, his figure was $18.21."

(*—*The figure* $31.28 *is incorrect, as the addition shows. It should be* $21.28.)

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hibits), the Interstate Commerce Commission said with respect to this same trainload movement:

" • • • then the total haulage expenses on this movement were $18.51 per car. When 6 cents per car for Federal income taxes, and $2.85 per car for Florida taxes are added, the haulage cost plus taxes is $21.42, and if $6.10 as representing a proportionate share of interest on investment at 5.75 per cent is added to the latter figure, the haulage cost plus taxes and return becomes $27.52 per car."

Thus on this trainload movement, the Master found that computations of costs, including taxes and profit, had been made by the following authorities in the following amounts:

Atlantic Coast Line Railroad,	$27.18 per car;
Interstate Commerce Commission,	$27.52 per car;
Mr. Saunders, (higher estimate)	$21.38 per car;
Mr. Saunders, (lower estimate)	$18.31 per car.

We point out that all of these computations included return on investment or profit at 5¾%, whereas the Railroad was not at the time in question earning any such return or profit. We reiterate that the amount paid was $41.60 per car and the Cummer Scale would have produced $20.48 per car. (*Note* *—5).

These Appellees and Cross-Appellants also produced before the District Court the cost figures of several large lumber companies operating their own log trains in Flor-

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(*Note* *—5). We call attention to the fact that in the original proceedings before the Interstate Commerce Commission *the Atlantic Coast Line Railroad had produced* a cost study of the trainload movement of Brooks-Scanlon Corporation from Perry and Carbur, Florida, to Eastport, Florida, for the month of September, 1926, which showed that the revenue under the Cummer Scale was $20.47 per car and that the cost so computed was $19.13 per car (Former Record 294-307, 522-532, 560-562 and 709-715). In that same original

ida in the territory here involved and during the time here involved, and demonstrated that the costs so incurred were far below the Cummer Scale (See pages 81-84 of our Main Brief entitled "Brief of Cross-Appellants"). They also produced trackage contracts and evidence with respect to the rental of equipment which, together with the other costs to be incurred in handling logs, demonstrated that there was a large profit in handling logs in trainloads under the Cummer Scale (See pages 78-81 of our main brief). These trackage contracts were shown to have been in effect on every major railroad in Florida, and the cost figures which were produced by the lumber companies handling their own log trains were by Florida companies operating in the territory where the logs here involved moved, and *in some instances operating their log trains over the tracks of the Atlantic Coast Line during the very period here involved.* We consider this evidence very convincing as to the cost of handling logs in trainloads. None of this evidence was before the Interstate Commerce Commission.

Upon the re-reference, these Appellees and Cross-Ap-

(*—5).

proceeding, the Florida Railroad Commission revised those cost studies and determined a total cost of $14.20 per car for the trainload movement of the Brooks-Scanlon Corporation in September, 1926 (Former Record 369-377, 629-641 and 644 to 656). It is difficult to see how the Atlantic Coast Line Railroad can be heard to say that the Cummer Scale of rates was confiscatory or unremunerative as applied to these trainload movements.

pellants produced and filed 108 exhibits. Only a few of them, showing principally some of the rate comparisons, had been produced before the Interstate Commerce Commission.

On the re-reference, the Railroad produced 75 exhibits and extensive testimony with respect to them. It first produced the reports and orders of the Interstate Commerce Commission of July 5, 1932, and January 9, 1933, and the decision of the District Court sustaining that order of the Interstate Commerce Commission. It produced comparisons of wages and costs for the years 1908, 1913 and 1930. It produced extracts from various decisions of the Interstate Commerce Commission. It then filed many analyses of the tariffs and scales of rates produced by these Appellees and Cross-Appellants. It then made further comparisons of other rates on logs and other commodities. It also undertook a criticism of the cost studies which these Appellees and Cross-Appellants had produced. None of this testimony which it produced had been before the Interstate Commerce Commission, except that certain of the rate comparisons which it made were reiterations.

In the first record before the Interstate Commerce Commission, upon which its invalid order was predicated, there were 53 exhibits and the narrative statement of the testimony occupies 326 pages of the record. In the reopened proceedings before the Interstate Commerce Commission there were 110 exhibits and 455 pages of narrative testimony. Before the District Court, there were not only the exhibits and testimony on the original proceeding before the Interstate Commerce Commission, that being a part of the record in this case, but there were likewise filed

307 exhibits and the narrative statement of the record occupies 778 pages.

Briefly stated, the difference between the evidence before the Interstate Commerce Commission on the reopened proceedings and that before the District Court is that the evidence before the Interstate Commerce Commission is only a portion of the evidence which was before the District Court. Before the Interstate Commerce Commission, these Appellees and Cross-Appellants relied on what they believed to be the law; before the District Court, we feel that they demonstrated upon the merits that the Cummer Scale of rates, as it was actually applied in Florida, was reasonable and remunerative throughout, and especially so as applied to the trainload shipments.

(e) The Cost Evidence Considered by the Interstate Commerce Commission was Directed to the Single Carload Shipments, and the Burden Upon Interstate Commerce Which Might Be Thereby Occasioned, Not to the Compensatory Character of the Rate as Actually Applied.

In connection with the cost studies, we desire to point out that the costs which the Interstate Commerce Commission undertook to ascertain were those attributable to single car shipments of logs. Thus, we have pointed out that in the original proceeding before the Interstate Commerce Commission both the Atlantic Coast Line Railroad and the Florida Railroad Commission produced cost studies of the trainload movement of logs of Brooks-Scanlon Corporation

from Perry and Carbur, Florida, to Eastport, Florida, and that both of those cost studies showed the Cummer Scale of rates, as applied to that trainload movement, to be compensatory. But with respect to those cost studies, the Interstate Commerce Commission found (Former Record 23):

> "Both cost studies are based on certain arbitrary assumptions, and both are based on movements in trainloads from two points of origin to one destination. Neither can be accepted to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida."

The Pierpont Scale (the scale of log rates here prescribed by the Interstate Commerce Commission) was originally prescribed for single car movements (50 I. C. C. 80 and 62 I. C. C. 669). It is not shown that a single trainload ever moved under it, except in Florida during the restitution period here involved and then only pending the appeal (*Note* *—6). In connection with the evidence before it in the re-opened proceedings, the Interstate Commerce Commission said (186 I. C. C. 182, page 196 of Exhibits):

(*Note* *—6). When the order of the Interstate Commerce Commission in the re-opened proceeding became effective on February 24, 1933, the last remaining trainload shipper (Wilson Cypress Company) built a small mill in the timber where it could cut only rough lumber, and its President testified that it had ceased to ship logs and would not ship any substantial amount of logs at the high rate so prescribed, but would utilize the mill as constructed in the timber (R. 838-839).

> "The costs in connection with the trainload movement from Hines to Palatka are undoubtedly less than they are in connection with movements in single carload lots. The Cummer Scale rates are not trainload rates but apply on single carloads; and all present log movements in Florida other than the Hines to Palatka movement are carload rather than trainload movements."

And the cost studies which were submitted by the Atlantic Coast Line Railroad Company in the re-opened proceeding before the Interstate Commerce Commission related to the cost of handling logs in single carloads. The Interstate Commerce Commission concluded that the basic figure in the Railroad's cost studies represented merely a system average of costs in connection with all traffic and therefore could not be accepted as indicating cost of transporting logs (186 I. C. C. 182-183, pages 196-197 of Exhibits). The Interstate Commerce Commission therefore made in its report its own cost study (186 I. C. C. 185-187, 196-197, pages 199-201, 210-211 of Exhibits). The cost study so made was admittedly a system average cost study and related only to the cost of handling logs in single carloads. *The costs which the Interstate Commerce Commission were trying to compute were the costs of handling logs in single carload lots, and not otherwise.*

The Interstate Commerce Commission in the reopened proceedings pointed out that these appellees and cross-appellants presented no affirmative evidence in the proceeding before that Commission tending to show the cost of transporting logs in Florida, but merely criticized the de-

fendant's cost evidence (186 I. C. C. 182, page 196 of Exhibits).

But the evidence is clear, and the Interstate Commerce Commission found in the first proceeding, that most of the Florida intrastate log traffic was in trainloads (Former Record 23). And it appeared that witnesses for the Atlantic Coast Line Railroad testified that the number of cars shipped in trainloads during the period here involved represented 53.2% of the total movement, and that the number of cars in less than trainloads represented 46.8% of the total (R. 206-207). That was in number of cars. In the amount of the claims, the trainload percentage was far higher, because the trainload shipments averaged a much longer haul. The Wilson Cypress Company, the Cummer Cypress Company and the Brooks-Scanlon Corporation were the trainload shippers. Observing the list of claims as filed by the Master (R. 94) it will be observed that the claim of the Wilson Cypress Company alone amounts to more than half of all the claims and that when the claims of Cummer Cypress Company and Brooks-Scanlon Corporation are added to it these claims on account of trainload shipments represent more than 70% of the total claims.

The Interstate Commerce Commission found that the costs in the trainload movement of Wilson Cypress Company were undoubtedly less than they were in the movement of single carloads (186 I. C. C. 182, page 196 of Exhibits). The Master, on the second reference by the District Court, found (R. 197-198):

> "The record shows that the cost of transporting logs was less when made in trainload ship-

> ments than in single car shipments and less when the shipments were less than trainloads but substantially above single carloads and the Master feels it his duty to take into consideration these facts and determine, as best he can, what would be a proper charge applicable alike to all shipments, according to weight and distance".

So too, the District Court, in its second opinion, observed that the trainload shipments of logs could be handled more cheaply than single carloads (R. 352).

The bulk of the log traffic of the Atlantic Coast Line Railroad was in Florida (R. 203-204). It did not appear that logs moved in trainload quantities on that railroad elsewhere than in Florida, during the period here involved, although there had been such movements elsewhere in earlier days. Before the Interstate Commerce Commission in the reopened proceedings, the Atlantic Coast Line Railroad gave no effect to this fact insofar as it related to costs, because any rate to be prescribed was to be applicable to single carloads, and it was the effect of the single carload as a revenue burden on interstate commerce which was sought to be determined by the cost calculations of (both) the Railroad Company and of the Commission. But obviously if the bulk of the movement was in trainloads and that was a cheaper method of handling the traffic, any proper cost study, made for the purpose of determining whether the rate was compensatory or remunerative or not, should take this fact into account. In other words, in determining the rate according to the actual circumstances and conditions surrounding the various transportation services, which

rate was to be applied, consideration should have been given to the greater economy of trainload movement as well as to the lesser economy of the single carload movement.

So while these Appellees and Cross-Appellants had produced no affirmative cost evidence before the Interstate Commerce Commission, they did produce such evidence before the District Court and that evidence was directed principally to the cost of handling the traffic in the method in which it moved, that is, mostly in trainloads. Not only was the cost evidence different in that these appellees and cross-appellants introduced affirmative cost evidence, but it was likewise different in that it related to the traffic as it had actually moved. While the cost studies of the Railroad Company and of the Interstate Commerce Commission were related largely to the same period, both cost studies purported to show the cost of handling logs in single carloads and were based upon system average costs of handling all freight traffic.

The difference between these methods of computing costs is illustrated in the results achieved. Thus, it appeared that the Commission estimated that the average car of logs on the Atlantic Coast Line Railroad in Florida traveled 81.36 miles and was loaded with 56,754 pounds of logs (186 I. C. C. 178, page 192 of Exhibits).

The cost studies of the Atlantic Coast Line Railroad and the computation which the Interstate Commerce Commission made undertook to determine the cost of such an average car by determining certain unit costs, such as ton-mile costs, for example, and, by multiplying, produce the costs for 56,754 pounds moving 81.36 miles. The cost studies produced by the Atlantic Coast Line Railroad (and

which were produced both before the Interstate Commerce Commission and the District Court) determined two total costs, one of $25.23, and the other of $34.32, both including taxes and return on investment at the rate of 5¼% (R. 217-218). The Interstate Commerce Commission condemned the cost calculations of the Railroad as being based on system average costs of handling all freight (186 I. C. C. 182-198, pages 196, 197 of Exhibits), and then in its own cost calculation determined a cost of $17.07 per car, to which was added $1.99 for taxes, and $5.63 for 5¼% profit or return on investment, making a total of $24.69 per car (186 I. C. C. 196-197, pages 210-211 of Exhibits). The Master, commenting upon the calculation made by the Interstate Commerce Commission, found that it "was based on system average" (R. 218). Both of these cost studies related only to single carload shipments.

We have pointed out that the cost evidence of these appellees and cross-appellants was produced only before the District Court. That evidence showed a cost of $13.19 per car, including the same rate of profit and taxes that all other traffic earned, and this estimate was based upon the log traffic here involved as it actually was handled as a whole, some in trainloads and some in single car shipments. The revenue per car for the average distance would be $15.12 under the Cummer Scale, and $31.12 under the rate prescribed by the Interstate Commerce Commission.

Thus, we think that even if the cost evidence before the Interstate Commerce Commission demonstrated that single carload shipments of logs in Florida would for the future place some revenue burden on interstate commerce, the cost evidence which was before the District Court and

not before the Interstate Commerce Commission demonstrated that the Cummer Scale of rates, as applied to the entire log traffic of the carrier in Florida in the method in which that traffic had been handled in the past period here involved (predominantly in linehaul trainloads), was not confiscatory, but was compensatory and remunerative. And the evidence before the District Court, as has been shown, was very different from that before the Interstate Commerce Commission at any time.

CONCLUSION

We respectfully submit: (1) that the District Court had jurisdiction to award restitution in this case and that it was its duty to so award restitution; (2) that the restitution to be awarded should have been measured by the Cummer Scale for the reasons set forth in sub-topics (a) to (d) inclusive, of POINT II, supra, but if not, it should have been measured by the common law standard of reasonableness; and if the District Court was right in measuring it by the common law standard, it should have applied the law to the facts in accordance with the principles set forth under sub-topics (f) to (h) inclusive of POINT II, supra; (3) that in such an inquiry the proceedings before, and findings of, the Interstate Commerce Commission should have no effect, evidentiary or otherwise; and (4) that the evidence

before the District Court was materially different from the evidence before the Interstate Commerce Commission.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA,

JANUARY TERM, A. D. 1935

ESCAMBIA COUNTY.

J. L. REINSCHMIDT, D. J. REINSCHMIDT and A. L. REINSCHMIDT, individually, and as former co-partners doing business under the firm name of Pensacola Cooperage Company,

Plaintiffs in Error;

—vs—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,

Defendant in Error.

Opinion filed January 23, 1935,
A writ of error to the Circuit Court for Escambia County,
L. L. Fabisinski, Judge,
Coe & McLane, for Plaintiffs in Error;
Carter & Yonge, for Defendant in Error:

DAVIS, J.

This was a railroad carrier's action to recover from a shipper the amount of alleged under-charge of freight on certain shipments of pieces of wood from 23 to 38 inches in length, and from 6 to 24 inches in diameter, designed and cut for stave bolts and headings. A previous judgment in

the cause was reversed. See Reinschmidt v. Louisville & Nashville R. R. Co., 112 Fla. 267, 150 Sou. Rep. 266. This is therefore the second appearance of this case in this Court.

The present writ of error now before this Court was sued out to an order granting the plaintiff railroad company a new trial after the defendant shipper had obtained a favorable verdict from the jury. The only proposition of law involved is whether or not a new trial should have been ordered as a matter of law.

It is plaintiff in error's contention that as a matter of law there was no ground for granting the railroad company a new trial, whereas the railroad company contends that the fact being established to the effect that the shipments in controversy were not fuel wood, it follows that the lower fuel wood freight rate, which was the rate actually collected, was an undercharge for which no other verdict could be legally rendered than for the plaintiff railroad company, on the evidence adduced.

Assuming that a debatable question is involved in this case to the effect that stave bolts and headings (a material used in making barrels) are in all essential respects analogous to fuel wood which is of the same general size and type of cut, and that on principle both commodities should take the same freight rate, the fact remains that the Florida Railroad Commission, which is the only authority possessing the rate making power, has made a classification which prescribes a different and lower freight rate on fuel wood than is applicable on stave bolts and headings. Hence in this case the rail carrier had no choice in the matter other than to insist on collection of the applicable and prescribed higher freight rate for the haulage of stave bolts

and headings, when it was shown or admitted that such was the character of the shipment when made, and, since the courts have no supervisory rate making power which they can exercise in derogation of what the Railroad Commission has prescribed as the lawful freight rate for haulage of stave bolts and headings, it follows that no question can be involved in the trial of this law suit other than to ascertain the nature and character of the shipment.

Where on the trial of a controversy over freight charges the nature and character of a particular shipment by rail is established by the evidence or has been admitted, and it appears that the Florida Railroad Commission has, after due notice and lawful hearing, prescribed and put into force a particular freight tariff and classification governing the freight charges to be imposed by the carrier for the haulage of a freight shipment of the particular nature and character shown or admitted by the evidence in the case, the Railroad Commission tariff is, *as a matter of law*, the only applicable and controlling tariff, and the court is without the right to enter upon any inquiry whether or not the prescribed Railroad Commission rate is just or reasonable or is otherwise proper as a proposition of administrative scientific rate making. Under the present law of Florida a rate cannot be collaterally attacked for unreasonableness after it is prescribed in due form of procedure by the Railroad Commission, nor attacked as a matter of law on grounds not going to the legality of the procedure by which the prescribed rate or classification was arrived at by the Railroad Commission in promulgating it. Such a situation as was presented at the trial of this case calls for

a construction of the prescribed tariff and classification only, when the facts of the case are admitted or established. Such construction is a matter of law for the court and should not be submitted to a jury. Hohenberg v. Louisville & N. R. Co., 46 Fed. (2nd) 952; Louisville & N. R. Co. v. Speed-Parker, Inc., (103 Fla. 439, 137 Sou. Rep. 724*.

Section 6703 C. G. L., 4618 R. G. S., paragraph 13, unlike the Railroad Commission Act of 1899, provides that every rule, regulation, schedule or order of the Commissioners shall be deemed and held to be within their jurisdiction and their powers, to be reasonable and just and such as ought to have been made in the premises, and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, unless the contrary plainly appear on the face thereof or be made to appear by clear and satisfactory evidence on an appropriate proceeding seeking to have same set aside.

The effect of this change in the statutory law is to make the tariffs and classifications of the Railroad Commission the only lawful rates that can be charged by a rail carrier, where no dominant Federal authority operates to prevent the enforcement of the rates prescribed, adopted

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* The holding in Cullen v. Seaboard Air Line Ry. Co., 63 Fla. 122, 58 Sou. Rep. 182, which may appear to be *contra* was predicated upon the Railroad Commission Act of 1899, Chapter 4700, Section 6. The 1899 Railroad Commission Act was much less comprehensive in legal scope and effect than the present Railroad Commission law which is to be found in Chapter 6527, Acts of 1913, and acts amendatory

or promulgated by the Railroad Commission in the exercise of its rate making powers under which it is authorized to make reasonable and just rates of freight and passenger tariffs to be observed by all railroads, railroad companies and common carriers doing business subject to Florida law.

Neither the reasonableness nor the measure of a commission prescribed rate can be *collaterally* assailed in a judicial proceeding. This is so because the Courts have no administrative jurisdiction to determine and fix rates *per se*, but jurisdiction only to determine whether the Railroad Commission proceeded within its powers and according to law, and acted reasonably in fixing a rate,—and that only in a proceeding to which the Railroad Commission is made a party.

A majority of the Court think that the Court properly granted the railroad company a new trial and that the order appealed from should be affirmed

Affirmed and remanded for further appropriate proceedings.

WHITFIELD, C. J. and TERRELL and BROWN, J. J. concur.

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of, and supplementary thereto. Under the present law a Commission prescribed rate in the only lawful rate where it has been prescribed by the Commission as the result of a full investigation and hearing on the subject. See Par. 18 of Section 6703 C. G. L., 4618 R. G. S. The 1913 Act was intended to fortify Commission made rates so as to make them the lawful rates when arrived at by the Commission by proper procedure.

ELLIS, and BUFORD, J. J. dissent.

BUFORD, J. Dissenting:

This case was heretofore before us. See Reinschmidt et al vs. L. & N. R. R. Co., filed October 7th, 1933, reported 150 Sou. 266. On the mandate going down jury trial was had. Verdict was in favor of defendant. On motion, verdict was set aside and new trial granted.

Motion for new trial contained nine grounds, as follows:

"1. The verdict is contrary to the evidence.
2. The verdict is contrary to the law.
3. The verdict is contrary to the charge of the court.
4. The verdict is not supported by the evidence.
5. The verdict is against the weight of the evidence.
6. The verdict is without evidence to support it.
7. The preponderance of the evidence was with the plaintiff.
8. The court erred in refusing to grant the plaintiff's motion to instruct the jury as follows, to-wit:

> 'You will find for the plaintiff the Louisville & Nashville Railroad Company, and assess its damages at $311.85 with interest thereon at 8% from July 20, 1932, the date of the institution of this suit.'

8. "The court erred in refusing to instruct the jury to find for the plaintiff."

Under the law of the case as enunciated by this court in its former opinion, supra, and the evidence as disclosed by the record, it appears to me that neither ground of the motion for new trial was well founded. Under the law and the evidence submitted, the trial court could not assume as against the preponderance of the evidence adduced that as a matter of law the commodity transported should have applied thereto the rate applicable to logs and not the rate applicable to fuel wood under which latter rate the carrier had classified and transported the commodity. The carrier failed to establish by a preponderance of the evidence that the commodity on which no special rate or classification had been fixed was nearer analogous to logs that to fuel wood.

The argument and authorities presented and cited in the dissenting opinion in this case on its former hearing here by the present writer and concurred in by Mr. Justice Ellis are applicable to the case as presented now and sustain the contentions of plaintiff in error.

Therefore, on authority of the opinion and judgment heretofore rendered, supra, as well as on the authorities cited and quoted in the dissenting opinion above referred to, I think the order setting aside the verdict and granting a new trial should be reversed.

ELLIS, J. concurs.

IN THE SUPREME COURT OF FLORIDA,

JANUARY TERM, A. D. 1935

ESCAMBIA COUNTY.

J. L. REINSCHMIDT, D. J. REINSCHMIDT and A. L. REINSCHMIDT, individually, and as former co-partners doing business under the firm name of Pensacola Cooperage Company,

Plaintiffs in Error,

—vs—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,

Defendant in Error.

Opinion filed February 9, 1935.

A writ of error to the Circuit Court for Escambia County, L. L. Fabisinski, Judge.

Coe & McLane, for Plaintiffs in Error;

Carter & Yonge, for Defendant in Error.

ON PETITION FOR REHEARING

PER CURIAM.

It was shown at the trial that the Railroad Commission had promulgated and put in force a general class rate known as "Class P" rate which was applicable to all shipments of short pieces of wood or logs, including those described as "stave bolts and headings." It was also shown

that the Railroad Commission had promulgated and put in force a special or exceptional commodity rate known as a "wood for fuel" rate which latter rate was allowed as an exception to the general Classs P rate that otherwise would have been applicable to "wood for fuel" in the absence of such commodity rate because of the general applicability of the "Class P" rate to all kinds of shipments of short pieces of wood not otherwise covered by a special commodity tariff.

So the only issue of fact that there was to be decided in this case was the issue whether or not the *particular* shipments sued for were shipments of "wood for fuel" or were shipments of short pieces of wood not designed for fuel and therefore required to come under the general class rate (Class P) which is intended to embrace all shipments of short pieces of wood, or logs, except cedar logs and except "wood for fuel."

The case of Southern R. Co. vs. Lowe, 170 Ala. 598, 54 Sou. Rep. 51, to which our attention has been called in the petition for re-hearing, is not in point here. This is so because that case turned upon an agreed classification of the particular shipment which the carrier subsequently attempted to repudiate by re-classificatipn for the purpose of claiming a higher charge.

In this case it is not even claimed that these particular shipments here in controversy were shipments of actual "wood for fuel" but simply that they are in all respects analogous to shipments of "wood for fuel" and should therefore take the lower "wood for fuel" special commodity rate instead of the general Class P rate which is sued for. But that question, as we pointed out in the original opinion, is

not a question to be decided by the Courts but is a question to be decided in the first instance by the Railroad Commission which has ample authority to prescribe a special commodity rate on stave bolts and headings equivalent to or no greater than the special commodity "wood for fuel" rate.

Re-hearing denied.

WHITFIELD, C. J. and ELLIS, TERRELL, BROWN and DAVIS, J. J. Concur.

BUFORD, J., Concurs in the conclusion.

I, G. T. WHITFIELD, Clerk of the Supreme Court of Florida, do hereby certify that the foregoing pages contain true and correct copies of the opinion rendered and filed by Said Court on the 23rd day of January 1935 in the cause as herein above styled and of the dissenting opinion in said cause filed by Mr. Justice BUFORD; and also a true and correct copy of the opinion filed in said cause on the 9th day of February 1935 by said Court denying the petition for rehearing which had been filed in said cause, as each and all of said opinions appear on file in my said office.

WITNESS my hand and the official seal at Tallahassee, Florida this 22nd day of February A. D. 1935.

(Official Seal) G. T. WHITFIELD,

Clerk Supreme Court of Florida.